CASES

Argued and Decreed

IN THE

HIGH COURT

OF

CHANCERY,

From the 12*th* Year of

King Charles II.

To the 31*ſt.*

——— *Ut dicere læſo*
Jus populo poſſint, Injuſtitiæque mederi.

LONDON,

Printed by the Aſſigns of *Rich.* and *Edw. Atkins* Eſquires; for John Walthoe, and are to be ſold at his Shop in *Vine-Court, Middle-Temple,* 1697.

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TO THE READER.

PIECES of this Nature, how indifferent ſoever, have never yet miſs'd a Favourable Acceptance: The very want and matter of them made them welcome to the World, *in ſpite of all the 'Diſadvantages of a Blunder'd Compoſition, infinitely below the Dignity of* Chancery, *and ſhort of that Excellent Language and Reaſon, with which Caſes are daily debated and decreed there. It is doubtleſs for the Honour of this Noble Court, its Proceedings ſhould be known, as well as the Intereſt of Mankind to be inſtructed how they may be relieved againſt the Trapans of Deceit and Fraud in this Great Sanctuary of Plain Dealing and Honeſty. This I hope will make the uſefulneſs of the preſent Publication unqueſtionable; which is here offered to the World without Encomiums and Flouriſhes from the Approbation of Great Men, or*

670270

Compariſon with meaner Books of this kind. If it be really the beſt Undertaking of this nature yet extant, the Reader *will eaſily diſcern it; and 'tis more reaſonable he ſhould take the Character from the* Book *it ſelf, than from the* Preface.

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DE
Term. Sanct. Trin.,
Anno Regis 12 Car. II.
IN
CANCELLARIA.

Chief Juſtice Foſter *in abſence of the Chancellor.*

Copleſton *againſt* Boxwill.

THE Plaintiff made an abſolute Conveyance in Fæ to the Defendant, by Leaſe and Releaſe, of Lands worth 1000 l. per annum in conſideration of 1000 l. The Plaintiff at the making the Conveyance had but the Reverſion in Fæ expectant on an old Life, which ſhortly after died; the Plaintiff then made Livery to the Defendant. The Bill was, That the ſaid Conveyance was a Mortgage, and that he might be admitted to redeem; The Proof was, That the Defendant had ſaid ſeveral times after the Conveyance, That he knew not how long he ſhould enjoy the ſaid Lands, and had ſaid

alſo, That he would take his Mony again with Damages. This was ſtrongly urged by the Plaintiffs Council to be a Mortgage.

Remedy for the Mortgagor and Mortagagee ought to be reciprocal.

Churchil of the Defendants Counſel inſiſted, that it is a Maxim, That none can come to redeem a Mortgage when the Mortgagee cannot compel the Payment of the Mortgage Mony; for the Remedy ought to be reciprocal. And in this Caſe the Defendant hath no remedy to inforce the payment of this Mony. And moreover he inſiſted, That if it were a Mortgage, it muſt be ſo à principio, either by a Condition in the Deed it ſelf, or by an other collateral Deed made at the ſame time; for the Condition ought to be made and conceived at the ſame time with the Conveyance. And in the principal Caſe it was not ſaid, that it was a Mortgage at firſt, but by Agreement ſubſequent, and then he ſaid, that was a nude Agreement, and no manner of execution of it.

A Poll Agreement after Conveyance cannot make it a Mortgage, if not ſo at firſt.

The matter by conſent was referred to be determined in an amicable way.

The Lord Chancellor.
Chief Juſtice Foſter.

Katharine Venables *againſt* Foyle.

Aſſignment of a Mortgage, the Mortgagee ordered to account before Aſſignment, and after it.

KAtharine Venables being a Tenant to Wincheſter-Colledge, of the Rectory of Andover, and indebted 700 l. to the Defendant, agreed with him, That he ſhould pay 400 l. to the Colledge for her, and that he ſhould ſurrender her Leaſe and take a new one in his Name; and it was alſo agreed that ſhe ſhould for the firſt year of the new Leaſe hold the Premiſſes, and pay the Colledge their Rent; and if ſhe did at the firſt years end pay the Defendant his 1100 l. with damages, the Defendant ſhould aſſign to the Plaintiff. The firſt year exſtureth, and the Plaintiff neither paid the Defendant his Mony nor the Colledge their Rent, and at thoſe years end ſhe permitted the Defendant to enter upon the Premiſes and to enjoy them. Thereupon the Defendant exhibited a Bill to have the Plaintiff (then Defendant) redeem, or be foreclosed of Redemption.

Redemption. She answered; and her intent thereby appeared to be, that the Plaintiff should satisfie himself by receipt of the profits, and not to pay him: Hereupon the then Plaintiff (now Defendant) assigned the said Lease to Nicholas Venables, the Plaintiff Katharine her Son, in consideration of an account made up betwéen them two of what was really due to the Defendant on the Mortgage. This Assignment recited the said Suit by Foyle to have Katharine redéem, and that his Interest was a Mortgage forfeited, and Nicholas Venables covenanted to indempnifie Foyle against Katharine. This being the Case, Katharine exhibited her Bill for to be relieved against Nicholas Venables and Foyle, setting forth the Estate to Foyle to be (as it was) a Mortgage, and sought to be admitted to the Redemption against them both. Nicholas Venables pleaded several Outlawries against her, so that she could not procéd against him. Foyle he answered fairly, that he had assigned to Nicholas Venables upon his paying him what was due, and not more. This Case procéded to an hearing against Foyle only, and in verity the Case was no more, but that a Mortgagæ assigns his Mortgage over for his due Debt. But it was much insisted by the Plaintiffs Counsel, That there was a breach of Trust in Foyle, and it was decreed that Foyle should account for all the Profits both before and after the Assignment, and pay the Overplus above his own Debt with damages to the Plaintiff, and convey and procure all claiming under him to convey to the Plaintiff fréé from Incumbrances done by him and them; afterwards Foyle not being able to perform this Decrée exhibited a Bill against Katherine Venables, setting forth a Fraud and Practice betwéen them, and that he was willing to account unto the time of his Assignment, and to comply with the Decræ as far as he was able, and prayed Nicholas Venables might come to an account from the time of the Assignment and Recovery. Nicholas Venables exhibited a Bill against his Mother claiming the original Lease by a Title paramount hers; and at the hearing the said Causes about a year and half after, it appeared that Nicholas Venables had a Title to the Lease paramount his Mother: And Foyle was, upon hearing the matter, discharged of the Decrée against him.

Outlawry pleaded.

A Mortgagee after Forfeiture assigns, and is decreed to account for the whole time, without the Assignee's being a Party.

A Bill to inforce to do an Act which the Plaintiff was formerly decreed to procure.

Decree avoided by original Bill.

DE
Term. Sanct. Hill.
Anno Regis 13 & 14 Car. II.
IN
CANCELLARIA.

The Lord Chancellor.
Foſter *Chief Juſtice.*
Windham *Juſtice.*
Hales *Chief Baron.*

Henry Goring *Baronet and others, Plaintiffs, againſt* Charles Bickerſtaffe *and* Elizabeth *his Wife,* John Everfield *by his Guardian, Dame* Ann Alford *Widow, and* John Alford *by Dame* Ann, *his Mother and Guardian, Defendants.* January 30.

Upon an Appeal, from a Decree made by the Maſter of the Rolls, by the Defendant Dame *Ann* only.

JOHN Alford deceaſed, being ſeized of the Manor of Hams, &c. by Indenture dated 1 April 14 Car. 1. and Fine thereupon, ſettles the ſame to the uſe of himſelf for life, the Reverſion, as to part, to the uſe of Frances his Wife for life, for her Joynture, Reverſion to his firſt and to his fourth Son in Tail, Reverſion to Sir Edward Alford his Brother for life, Reverſion to Sir Ed. and to his firſt and

all

all other his Sons, Reverſion to his own right Heirs, under a Proviſo that it ſhould be lawful for the ſaid John and Sir Edward, when they ſhould be ſolely ſeized of the Premiſſes, or any part thereof by vertue of any of the Limitations at their pleaſures to make Leaſes of the ſame or any part thereof for one and twenty years, under what Rent they pleaſed. 7 Julii, 1643. John Alford made his Will, and thereby gave his Daughter Jane (the Defendant Everfields Mother) 600 l. To his Daughter Elizabeth (now Wife of the Defendant Bickerſtaff) 500 l. to make her Portion 3000 l. and deviſed to her all his Meſſuages in White-Fryars in London, Pickhatch and Goſwel-Street in Middleſex, and in Wigonholt in Suſſex, to her and to the Heirs of her Body, the Reverſion to Sir Edward Alford and his Heirs, provided that if Sir Edward paid Elizabeth 2500 l. at her Marriage, or at 21 years of age, which of them ſhould firſt happen, the Eſtate to her to ceaſe, and the Premiſſes to remain to Sir Ed. and his Heirs, and of his ſaid Will made Frances his own Wife Executrix, and afterwards purſuant to his power by the Indenture of the firſt of April, 14 Car. 1. by Indenture of the firſt of January, 1648. did demiſe to the Plaintiffs the greateſt part of the Manor of Hams, &c. from Michaelmas then laſt paſt, for one and twenty years, under 10 s. yearly Rent, upon Truſt, that they ſhould permit the ſaid John Alford during his Life to take and receive the Rents, Iſſues, &c. of the ſaid Manor; and upon further Truſt, that after his death, Frances, his Wife, ſhould receive the Rents, Profits, &c. in ſatisfaction of her Jointure ſo far as the Premiſſes by any former aſſurance were lyable thereunto, and to permit her, during her life, if the Term ſo long continued, to receive out of the reſidue of the Rents of the Premiſſes 120 l. per annum, and certain Fire-Wood and Fagots; and that the Plaintiffs ſhould pay the ſaid Jane Everfield 50 l. per annum during the life of her Huſband; and ſhould permit the ſaid Frances, his Wife, during her life, if the Term ſo long continued, to receive the reſidue of the Rents, during the reſidue of the Term of one and twenty years, if ſhe ſhould ſo long live, to the intent ſhe ſhould pay thereout ſo much Mony towards the Legacies of his Will, as his perſonal Eſtate ſhould be wanting to pay, and to pay the reſidue to ſuch perſon as the ſaid John Alford ſhould by his Will appoint; and for want of ſuch nomination to receive the ſame to her own uſe. And upon further Truſt that the Plaintiffs after the

the death of Frances, during the reſidue of the Term of one and twenty years, ſhould permit ſuch perſon and perſons as the ſaid John Alford by any writing by him ſigned and ſealed in the preſence of two credible Witneſſes, or his laſt Will, ſhould nominate, and for want of ſuch Nomination after the death of the Nominée, the Heir of the ſaid John Alford to take and receive all and ſingular the Rents of the Premiſſes: The ſaid John Alford by Deed the ſame firſt of January, 1648. ſigned and ſealed in the preſence of four credible Witneſſes, thereby reciting the ſaid Demiſe and Truſt, did nominate and appoint the eldeſt Son of William Alford his Brother to have out of the reſidue of the Premiſſes 50 l. per annum, during the ſaid Term, and his two younger Sons 60 l. a-piece, and the ſaid Sir Edward Alford to receive the reſidue of the Rents and Profits by the Truſt of the ſaid Demiſe limited to be paid to the ſaid Frances, and after her death to take and receive the reſidue of the Rents and Profits during the reſidue of the ſaid Term to his own uſe. It appeared by one Witneſs that John Alford three or four days before his death, which was before the Truſt, and the Declaration of Truſt, did acquaint that Witneſs that he had ſettled the Eſtate in Hams well, as he thought he could, and that his Brother Sir Edward Alford was by an Agreement between them to have all his Eſtate there after his death, and that he thereout appointed ſome allowance to his Daughter Everfield, and declared that his Daughter Elizabeth (now Wife of the Defendant Bickerſtaff) was not to have any thing out of his Eſtate there, for that he had otherwiſe provided for her. John Alford the Night or the ſame Day the Demiſe and Declaration bore date, dyed without Iſſue Male, leaving the Daughters his Heirs. Sir Edward Alford died intеſtate September, 1683. The Defendant Dame Ann his Relict, had taken out Adminiſtration; Jane, the Mother of the Defendant John Everfield, and whoſe Heir he was, dyed in the life of Frances her Mother; Frances having proved John Alford her Husbands Will, dyed in 1659. having made the Defendant, Elizabeth Bickerſtaff, Executrix. The Defendant Dame Ann, as Adminiſtratrix of Sir Edward Alford Defendant, John Alford as firſt Son and Heir of Sir Edward Alford Defendant, Bickerſtaff and his Wife in her right, ſhe being one of the Coheirs of John Alford, and Executrix of Frances, who was the Executrix of John Alford, and John Everfield, as Heir

to

to Jane, Co-heir with Elizabeth Bickerſtaff, claimed the benefit of the Truſt during the reſidue of the one and twenty years after Frances her death; ſo the Plaintiffs being Truſtees, ut ſupra, the Defendants all claiming the benefit of the Truſt under ſeveral Titles, The Bill was to have the Defendants enterplead, and to deſire the direction of the Court, to whom the Truſt belonged.

Upon the firſt Hearing by the Maſter of the Rolls, 2 Novemb. 13 Car. 2.

Inaſmuch as the power reſerved to John Alford by the Leaſe is, That after the death of Frances the Truſtees ſhould permit and ſuffer ſuch perſon and perſons as he ſhould nominate, and after the death of the nominee his own right Heirs to receive the Profits, &c. The Court was of Opinion, That John Alford had no power to nominate any perſon to receive the Rents, &c. but during the Life of the nominee and no longer; for after the nominees death the Heirs at Law are nominated by the original Deed to receive, &c. And when after by Deed Poll Sir Edward Alford is appointed to receive the Rents, that muſt be intended if he ſo long liveth; for the Deed Poll reciteth the Leaſe, and is in purſuance of the Truſt therein, and that John Alford his intention in the original Leaſe was plain, That after the death of the nominee his own Heirs ſhould have the reſidue of the Truſt; and both the Deeds being executed at one time are to be taken as one Aſſurance; and if he had meant the Heirs, Executors or Adminiſtrators of Sir Edward ſhould have the remaining part after Sir Edward, he would have named them as well as Sir Edward; and for that the Intereſt of the Term was alwaies in the Plaintiff, and never any real or legal Intereſt in Sir Edward, but as nominee to receive the Profits, he being dead, the Truſt to him ceaſeth, and nothing paſſeth to his Heirs or Executors, but remaineth to Elizabeth the ſurviving Daughter, Heir and Executrix to John Alford, and the teſtimony of that one Witneſs can be intended to relate to no other Settlement but the firſt by Deed and Fine, and not the Truſt of the Leaſe, which was not in being when the ſaid John Alford had the diſcourſe with that Witneſs, but was made the day of his death, and that the reſidue of the Term of one and twenty years doth belong to the Heir at Law of John Alford, who in a doubtful caſe ought to be preferred, eſpecially when it is ſo conſonant to John Alford's intention,

Two Deeds of the ſame date touching one thing but one Aſſurance.

Heir at Law to be preferred in a doubtful caſe.

intention, and the Defendant Bickerſtaff is alſo his Executrix and Daughter, and doth therefore order and decree the ſame accordingly, and that the Rents arrear and for the future be paid to the Defendant Bickerſtaff during the Coverture betwèn them, and after to the Defendant Elizabeth Bickerſtaff during the reſidue of the Term.

And upon the Appeal the queſtion was upon the whole Caſe, Whether John Alford had power to diſpoſe of the Truſt of the whole Term of one and twenty years after the death of Frances, and how far he had power to diſpoſe of it, and whether there were not a Reſtriction by the Limitation of the firſt Deed to the Heirs after the death of the Nominæ, that did diſable his diſpoſition thereof farther, except to his Heirs, and whether John Alford had diſpoſed the whole Term or not, and which of the Parties ought to have the Remainder of the Truſt.

The Counſel of the Defendant Bickerſtaff now offered farther, that John Alford had no power after two diſtinct Limitations to two ſeveral perſons, to limit it to a third after the death of the ſecond, becauſe it would make an Executory Deviſe upon an Executory Deviſe to tend to the intayling of a Chattel, and creating a Perpetuity, and that the Limitation of John Alford was out of the Power and Truſt, and not of any Intereſt in the Reverſion of the Term. They did all agree in one uniform Opinion, That the Limitation of a Term to ſeveral perſons in Reverſion one after another, if thoſe perſons were in being, and particularly named could in no wiſe tend to the intail of a Chattel or Creation of a perpetuity; but limiting of it to a perſon not in being, did; and that where any perſon had the Truſt of a Poſſibility in Remainder of a Term, he had good power to declare and make a diſpoſition of the Truſt of ſuch Poſſibility; but that the Limitation of ſuch Remainder in Poſſibility of a Chattel real to the Heir of the perſon limiting was a void Limitation, and the Eſtate in Intereſt did again revert to John Alford who made that Limitation, and he having by the Deed Poll the ſame day of the Leaſe, which was made purſuant to the power of the firſt Settlement, limited to Sir Edward Alford the whole remaining Term after the death of Frances without any other Limitation or Reſtriction, which he might eaſily have done (if ſo intended) the ſame was a good Limitation of it to Sir Edward his Executors and Adminiſtrators; and if the power in John Alford had been defective,

Executory Deviſe.

Perpetuity.

Limitation in Reverſion to ſeveral perſons in being doth not tend to the creation of a Perpetuity, but otherwiſe if it be to a perſon not in being.

The Truſt of a Poſſibility is aſſignable or declarable.

On a void Limitation the Eſtate reverts to the Limitor.

Limitation of the Truſt of a Term to one, good to his Executors.

fective, his Interest ought to come in aid and supply it to make good such Limitation, for otherwise there would be no disposition at all of the remaining Term, and the Legacies of 50 and 60 l. to William Alfords Children would be avoided, and the Interest in the remaining Term might be pretended to be in the Trustees, and they claim the Estate discharged of the Trust, there being nothing to oppose the power or intention of John Alford in limiting the whole Remainder of the Term to Sir Edward, but the implicated, misplaced and mistaken expression of the Lease. The whole Court was clear of Opinion, that the former Decrée was grounded upon a mistaken foundation; and that taking both Deeds together, no other equitable or reasonable Interpretation can be made thereof, but that according to the Power, Interest and Intention of John Alford, who it appears by one Witness never intended the Estate to whom it was decreed by the former Decree the whole remaining Term in the said Lease and Trust therein after the death of Frances, for the residue was well limited and appointed to Sir Edward Alford, his Executors and Administrators; and that the Defendant Dame Ann is well intituled thereunto, and doth over and decrée that the former Order and Decrée be discharged, and that the Plaintiffs shall come to an account for, and pay the said Dame Ann the Rents and Profits of the said Manor which are arrear and to grow due until the expiration of the Remainder of the said Term of one and twenty years, and convey to her for the residue of the Term, if so required, and in so doing shall be protected and saved harmless by the Authority of this Court, Vide Moors Reports 809. Totton *contra* Mollineaux, 1 Co. Rep. 156. 3 Cro. 577. 10 Co. 47, 48, 52. And Quære, why the Trust of a Possibility in the Remainder of a Term is disposable over, and the Possibility in Interest in the Reversion of a Term is not assignable, Vide 8 Co. Rep. 96.

The Interest of the Limitor is to supply his power if that be defective.

The Lord Chancellor.
The Master of the Rolls.
Chief Justice Hide.
Justice Twisden.

Pollard *against* Greenvil.

THE Plaintiff lent the Lady Greenvil 100 l. and one Culliford, as her chief Agent and Friend, became bound for the same: And the Lady having power to make a Lease in possession for one and twenty years of her Estate makes a Lease to Culliford for one and twenty years to secure him from the Debt aforesaid, and several other Debts he was ingaged for the said Lady; but the Lease was made to commence from a time to come, which was void in Law, in respect her power was but as aforesaid, and Culliford had the Possession for some time, but was afterwards ousted by force, by the Lady's Husband; but her Husband not long afterwards dying, she enjoyed it for the remainder of the Term, and Culliford being dead and leaving no Assets, the Plaintiff therefore preferred his Bill here for the Debt aforesaid. But for that it appeared to the Court that the Mony was imployed for his use who created the Trust for payment of Debts, and she having received the Profits for thirteen years, and for that the Lease was not good in strictness of Law, yet the Court was satisfied that the same did amount to a good declaration of her power in Equity to make the Lease for one and twenty years in being, and that the Receipts of Profits was also under that power, and subject to the Trust: And although the Defendant did set forth by Answer, that Culliford at the time of his death was indebted to her, yet the Defendant was decreed to pay the Debt.

A defective Execution of a Power made good in Equity.

DE
Term. Sanct. Trin.
Anno Regis 14 Car. II.
IN
CANCELLARIA.

The Lord Chancellor.

Anonymus.

Upon a Demurrer after *Trinity* Term 14 Car. 2. 1663.

THE Bill was barely to discover a Deed. The Defendant demurred, because the Plaintiff had not made Oath according to the course of the Court that he had not the Deed.

Where it behoveth that the Plaintiff make Oath of the want of a Deed, where not.

Serjeant Glyn for the Plaintiff insisted, That the Oath was not required by the course of the Court in this Case, and he took this difference, That when the Bill alledgeth the want of a Deed, and seeketh to be relieved upon the matter of that Deed, by a Decree, there such Oath is necessary; but where the Bill seeks no Decree, but barely to have the Defendant discover, whether he hath such Deed or not, or to have the Deed produced at a Tryal; in that Case the Plaintiff ought not to be put to his Oath, for its not to be presumed the Plaintiff would exhibite a Bill in either of the later Cases, if he had the Deed. This difference was well approved of by the Lord Chancellor, and thereupon the Demurrer over-ruled.

Sir Thomas Bennet *and Sir* William Brownlow, *Knights, Plaintiffs, againſt* Mary Box, *Relict of* Henry Box, *and Daughter of* Ralph Allen, Walter Stonehouſe, *Son and Heir of* Elizabeth Stonehouſe, *another of the Daughters of* Ralph Allen, George Burdet, *Son and Heir of* Martha Burdet, *another of the Daughters of* Ralph Allen.

ANNO 15 Jac. Ralph Allen purchaſeth Lands in his own Name, and in the Name of Edward Hammond, in Truſt for Ralph Allen and his Heirs, and Hammond to take nothing thereby: But the Truſt is not expreſſed in the Conveyance. William Allen Senior did borrow 600 l. of John Bennet, and the ſaid William Allen, Ralph Allen and William Allen Junior, Son and Heir of the ſaid Ralph Allen, (William Allen Senior being firſt bound in the Bond) 1630. did become bound unto the ſaid John Bennet, ſince deceaſed, for the payment of the ſaid 600 l. by Bond of 1000 l. wherein they bound themſelves and their Heirs, under whom the Plaintiffs are well intituled to the Debt in queſtion. And one Witneſs depoſeth that Ralph Allen was a good Husband, not one that contracted any Debts of his own, and believes he and William Allen Junior were only Sureties for William Allen Senior. Ralph Allen dies, and Hammond ſurvives, and after dies; then William Allen, Son and Heir of Ralph Allen, dyeth without Iſſue, and the now Defendants as Heirs at Law bring their Bill againſt the Heirs of Hammond, who had the Eſtate in Law, to have the Lands conveyed to them in performance of the Truſt, which is decreed accordingly, and the Lands conveyed unto them as Heirs at Law of Ralph Allen.

The now Plaintiffs bring their Action of Debt at Law againſt Henry Box, ſince deceaſed, and the now Defendants as Heirs of Ralph Allen. The Defendants thereunto pleaded Riens per diſcent præter a third part of a Meſſuage, worth 6 l. 13 s. 4 d. per annum.

January,

January, 1662. The now Plaintiffs bring their Bill in this Court against the Defendants, and Henry Box the Defendants late Husband, who had the Lands decreed and conveyed unto them as Heirs of Ralph Allen, to have them decreed as Heirs, to pay the just Debts of Allen, or to have the said Lands made lyable to pay the said Debt as Assets in Equity.

The Defendants, Box and Stonehouse, pleaded, that the said Action still depended, which is a double veration; and demur, and demand Judgment, whether they as Heirs shall be charged in Equity, without any Trust or Agreement further than the Law chargeth them.

On hearing thereof, a Case was stated on the Bill, Plea and Demurrer; and afterwards Henry Box died. And before any Bill of Revivor against the Defendants, It was Ordered, May 12. 1673. that the Defendants do answer the Plaintiffs Bill; but the benefit of the Plea to be considered of at the hearing.

The Defendants deny that they have entred into, or received any of the Profits of the said Lands, the same being ever since 7 Car. extended for the Debts of Ralph Allen, and ever since held by Sir John Banks and his Executors, and formerly before the Extents were let at 500 l. per annum, and after at 300 l. per annum, and now but at about 400 l. per annum, and whereout above 60 l. is deducted, for the Charges of the Sea-Banks, and the rest will not pay the Interest of the Principal Debt, as the Extendors alledge.

An Original was filed by the Plaintiffs against Henry Box and the other Defendants on the Bond in question in the Common Pleas, bearing Teste 14 Feb. 1659.

The Defendant Walter Stonehouse did for 400 l. bargain and sell his third part of the Reversion in Fee of the Lands in question to Henry Box, deceased, by Deed bearing date 3 Octob. 1660. and the said Henry paid then to the said Walter the 400 l. Purchase Mony for the same, and the Defendants as they swear by their Answer, had not then or in some Months after any notice of the said Original, and no notice is proved; and one Witness deposeth he believeth there was no notice, for he being conversant in all Mr. Boxes Affairs, if there had been any notice, he should have heard of it, as he verily believes.

The Defendant George Burdet, after the other Defendants were ordered to answer, put in his Answer, and there-

thereby inſiſted on the ſame matter the other Defendants did by their Plea and Demurrer, and was on June the 9th laſt paſt ſerved with Proceſs ad audiendum Judicium upon 21 June following, but appeared not at the hearing, or any for him.

1. Queſtion. Whether the ſaid Lands as this Caſe is, ſhall or ought to be decreed as Aſſets in Equity?

2dly. Or whether the Plaintiffs ought to have any Decree in this Caſe againſt the Defendants?

Truſt Lands no Aſſets in Equity although the Truſt be decreed in Equity.

Chief Juſtice Hide, Chief Baron Hales, and Juſtice Windham were of Opinion on hearing Counſel on both ſides, that the Lands in the ſaid Caſe and Bill mentioned (as the Caſe is ſtated) are not, nor ought to be decreed as Aſſets in Equity, and that the Plaintiffs ought not to have any Decree againſt the Defendants.

Afterwards in Hillary Vacation, 1664. the Bill was diſmiſt upon the Judges Certificate, 14 Novemb. 1667. or 1661. in a Caſe wherein Clark was Plaintiff againſt Sir Thomas Fanſhaw.

The like Judgment upon a Demurrer.

DE
Term. Sanct. Mich.
Anno Regis 14 Car. II.
IN
CANCELLARIA.

The Lord Chancellor.
The Maſter of the Rolls.

Dr. Coldcot *againſt* Hill *and others.*

THE Caſe was to this purpoſe. Dr. Coldcot having purchaſed Church Lands in Fée under the Title of the Uſurper (during the Rebellion) ſold the ſame in Fée to the Defendants Teſtator, and covenanted that he was lawfully ſeized,&c. The Church being reſtored, and the Eſtate voided, the Covenantée ſued the Covenant and recovered damages to the value of the Purchaſe Mony. To be relieved in this was the ſcope of the Bill, which did ſuggeſt a ſurpriſe upon the Plaintiff in getting him into that Covenant, and that it was declared by Dr. Coldcot, when he ſealed, and the Defendants Teſtator, that it was intended Dr. Coldcot ſhould not undertake any further than againſt himſelf. Upon the hearing it was proved that the matter of the Covenant, upon which the Judgment was had againſt the Plaintiff, was controverted in the Paper Draught, and put out by the Plaintiffs Counſel, and in again by the Defendants Counſel, with the alteration only, that whereas the Covenant was

Averment againſt a Deed.

Relief for one who had entred into a general Warranty, where he intended but againſt himſelf only, and this after Eviction.

was that the Plaintiff was lawfully seized, &c. the Plaintiffs Counsel put out (lawfully) which signified nothing; for to covenant one is seized, is intended lawfully. But some proof being that it was declared upon sealing, that the Plaintiff should undertake for his own Act only,

Relief against ones own Act.

It was decreed, that the Defendant should acknowledge satisfaction on the Judgment and pay Costs. And a like Case to this betwæn Farrer and Farrer was heard, and decreed after the same manner about six Months before.

The Lord Chancellor.
The Master of the Rolls.
Chief Justice Hide.

Lee *against* Hale. 31 Januarii.

1. RUled that a Devise of the moiety of the personal Estate to the Wife, and then of divers Legacies, and after of the residue to another, that the Wife shall have a full Moiety, if the other Moiety be sufficient to pay the Debts, and that the Debts shall go out of the other Moiety, Dyer 164. Against which it was objected, that the Husband could not bequeath any part till the Debts paid, and that therefore the Debts ought to be first deducted out of the whole Goods; but that Objection was over-ruled. The other Moiety left being sufficient for the Debts in his Case.

By the Devise of the Moiety of a personal Estate, what passeth.

2. Ruled that by the bequest of a Moiety of the personal Estate, where the Testator had Monies, Bonds and a Lease for years, a Moiety of the Lease passed. Against which it was objected, That that was not usually reckoned personal Estate.

DE

DE
Term. Sanct. Hill.
Anno Regis 14 & 15 Car. II.
IN
CANCELLARIA.

The Lord Chancellor.
Chief Justice Bridgman.
Chief Baron Hales.

The Lord Marques of Antrim *againſt the Duke of* Buckingham. January.

THE Lady Antrim Mother of the Defendant being a Feme ſole, and ſeized of a Reverſion after one life, ſettles the Lands to the uſe of her ſelf for life, Remainder in Tail, with power for her, being ſole, to make Leaſes for three Lives in poſſeſſion. The Feme marries, and then ſhe and her Husband make Leaſes for one and twenty years (in the life of Tenant for life) to commence from the date, for payment of Debts, &c. as was alledged.

1. Queſtion. If this Leaſe by Baron and Feme was good.

Bridgman. The power is not purſued; for by the Marriage ſhe hath put her ſelf in the power of her Husband; and it is the Deed of her Husband, and not hers. And he took a diverſity betwéen a naked Power and a Power which flows from an Intereſt; for when a bare Power is given to a Feme by Will, to ſell Lands, although ſhe marry ſhe may ſell, and may ſell the Lands to her Husband, becauſe it was not created by her ſelf out of any Intereſt of her own. But where a Feme upon a Settlement of her own Eſtate reſerves a Power which flows from an Intereſt, that Power ought to be executed by the Feme ſole, and if by Baron, and Feme it is not good; and yet he ſaid, ſuch Power ought to be taken liberally, though formerly they were taken ſtrictly.

Power to a Feme how it is to be executed.

2. Queſtion. If this Leaſe was a Leaſe in Poſſeſſion, inaſmuch as it commenceth at the time of the date.

For it was ſaid, although an Eſtate for life were before it, yet it was in poſſeſſion, in relation to the Eſtate of the Reverſion.

Where a Leaſe in Poſſeſſion out of the Reverſion as to the Eſtate of the Reverſion.

Bridgman doubted whether the Leaſe was void in that point, but was clear it was in the other point.

Hales ſaid, Both Points are worth Tryal and Argument at Law.

The Chancellor concurred with Bridgman; and the Bill was diſmiſt.

Fuller *and others againſt* Lance *and others.*

Fuller being a Goldſmith in London, and being diſabled, agreed with moſt of his Creditors to aſſign over all his Eſtate upon Oath to ſeveral perſons in Truſt for the payment of his Debts, as far as his Eſtate would pay, he having ſuch allowance for himſelf and Family as was agreed upon. And moſt of the Creditors ſigned the ſaid Agreement; but ſome of the perſons that ſigned, finding that Fuller had done ſome act of violation of the Agreement, took out a Commiſſion of Bankrupſie againſt the ſaid Fuller, and ſeized all the Eſtate they could come by, and pretended that

Commiſſion of Bankrupt.

that ſome of the Creditors aforeſaid that ſigned the Agreement, and that were not privy to the ſuing out the Commiſſion had notice in due time, though they had neglected the ſame, and that it was ſeven Months from the date of the Commiſſion before the Commiſſioners aſſigned. And Fuller and other the perſons concerned in the firſt Agreement, and excluded by the Commiſſion of Bankrupſie, being not comprized, as aforeſaid, preferred their Bill againſt the Aſſignées of the Commiſſion of Bankrupſie, to have the Agreement performed, or at leaſt to be admitted to an equal Dividend with them. But this Court would give no relief therein, and the rather, for that it was made appear that Fuller had made a Sale of ſome of the Goods he aſſigned to the Creditors; but diſmiſt the Bill.

Note, That where Committées of a Lunatique ſue for any thing in the right of the Lunatique, in ſuch caſe the Committée as well as the Lunatique are made Parties.

DE
Termino Paſchæ
Anno Regis 15 Car. II.
IN
CANCELLARIA.

The Lord Chancellor.
Windham *Juſtice.*

Sir Edward Heath *againſt* Henly *and* Whitwick. May 25.

THE Plaintiff was Son and Executor of the late Chief Juſtice Heath (who was made Chief Juſtice at Oxon during the difference betwéen the King and Parliament, but never ſat as Chief Juſtice in Weſtminſter-Hall) And the Bill was to have an Account of Monies received by the Defendants being Pothonotaries of the Kings Bench, which was alledged to belong to the ſaid Chief Juſtice, and which Monies they by their Office ought to receive for the Chief Juſtice by an implied Truſt Virtute Officii. The Defendant pleaded the Statute of Limitations 21 Jac. 16.

A Truſt out of the Statute of Limitations.

Upon the arguing of this Plea, It was inſiſted by the Plaintiffs Counſel, that this Truſt was not within the ſaid Statute. And it was anſwered of the other part, that a Guardian was within the ſaid Statute, and he was truſted. Ordered that the Defendants ſhould anſwer.

The

The Lord Chancellor.
The Master of the Rolls.

Dorothea *Dame* Darcy *against* Chaloner Chute, Henry Haughton, *and others.*

THE Plaintiff being a Widow, and seized of a Jointure worth 700 l. per annum, Mr. Chute the Father made suit to marry her, and she agreeing to it, he before the Marriage agreed with her by Deed in Writing, that it should be lawful for her, or such as she should appoint, during the Coverture, to receive and dispose of the Rents of her Jointure as she pleased.

The Deed was put in Haughton's hands, he being the Plaintiffs Agent formerly.

Then the Plaintiff and Mr. Chute married, he having first agreed with Trustees of hers to settle her a Joynture; and they lived together ten years, during all which time Haughton received the Rents of the Ladys said Joynture of 700 l. per annum, and constantly with the approbation of the Plaintiff accounted for, and paid the same to Mr. Chute her Husband. And the Plaintiff all that time never appointed Haughton to receive the Rents for her, nor claimed any benefit by the Agreement left in Haughton's hands; but at the ten years end Mr. Chute dying, having made the Defendant her Son Executor, the Plaintiff exhibited her Bill to have an account from Haughton, and charged 1000 l. to be resting in his hands unaccounted for, that was received in Mr. Chute her Husbands life time, and she made Title to the same by the said Agreement made by Mr. Chute with her self before Marriage. And upon the hearing (a Case being cited and urged by the Defendants Counsel) the Court declared the aforesaid agreement before Marriage with the Plaintiff her self, was immediately by the Marriage extinguished, the Court would not relieve the Plaintiff thereupon: But ordered the Defendant Haughton to account before a Master for what he received after Mr. Chute's death.

Marriage determines an Agreement made by Baron with Feme before Marriage.

DE

DE
Term. Sanct. Trin.
Anno Regis 15 Car. II.
IN
CANCELLARIA.

The Lord Chancellor.
Chief Justice Hide.
Chief Baron Hales.

Sir Henry Bellasis *and his Wife, against Sir* William Ermine, June 4.

Upon a Plea.

THE Suit was for a Portion of 8000 l. given to the Plaintiffs Wife. The Defendant pleaded it was given her, provided she did marry with the consent of A. and if not, she should have but 100 l. per annum; and that she married without the consent of A. Ordered that the Plea stand over-ruled.

Where the Condition annext to the Gift of a Portion shall defeat the Portion, and where not.

And the Court all declared this Proviso was but in terrorem, to make the person careful, and that it would not defeat the Portion.

But it was said in the Case of her Marriage without the consent of A. if the party that gave the Portion had limitted it to another, there it had been otherwise. And in this Case the Wife was not unequally married; For the Plaintiff is the Heir Apparent at Law of the Lord Bellasis.

The

The Lord Chancellor.

Pawcy *againſt* Bowen. June 26.

RESOLVED that where a perſon hath power to leaſe for ten years, and he leaſeth for twenty years, that the Leaſe for twenty years ſhall be good for ten years of the twenty in equity. And it was ſaid to have been ſo ſettled ſeveral times in this Court.

A Leaſe for more years than the Leſſor had power for, ſhall be good for ſo many years as he had power for.

Criſpe *and others Executors of Sir* Nicholas Criſpe *againſt* Blake. June 26.

IN 1642. Sir Nicholas Criſpe and four others became bound to the Defendants Teſtator in 1600 l. for the payment of 1000 l. and Intereſt at ſix Months end. Intereſt was paid till 1644. In Michaelmas 1662. the Defendant got Judgment againſt Sir Nicholas Criſpe, and one other of the Obligors for 1600 l. (being the penalty) Afterwards there was paid by them, againſt whom the Judgment was, and the other Obligors, at ſeveral times to above 1600 l. And ſo the Bill was to have the Judgment vacated, and the Bond delivered up, paying ſo much as would make up the penalty of the Judgment, and Intereſt for the ſame ſince the Judgment.

It was inſiſted on by the Plaintiffs Counſel that when Judgment was had on the Bond, it remained no longer a Debt on the Bond, nor was Intereſt due on the Judgment; ſo what was paid after muſt be taken as paid on the Judgment; and if they had brought that 1600 l. into Court at Law (and offered to pay it before Execution) the Court at Law would have accepted it. And therefore being willing to make up what was paid already the full of the Judgment and Damages ſince the Judgment, ought to be relieved againſt the Judgment.

On the Defendants part it was inſiſted, that there was more Mony due for Intereſt on the Bond, and that that was paid as well by thoſe Obligors againſt whom there was no Judgment, as by thoſe againſt whom the Judgment was;

was; and what was paid by those against whom there was no Judgment, there part of what was paid in by the course of the Court was to be taken as Interest, there being more Interest due on the Bond than the Mony paid; and there is no Equity in this Case to hinder the Defendant from recovering of what he can at Law, there being much more in Conscience due; and if what is justly due be to be received by any course of Law, no Equity ought to hinder it, so as he do not receive more than Principal Interest and Costs, which the Defendant offers to take on Account.

He that takes a Security by a Penalty ought not to have more.

It was replyed by the Plaintiffs Counsel, That one satisfaction by any of the Obligors, shall be a discharge at Law for the rest; and a Release to one Obligor is a discharge to all the rest. And when a Man takes a Security by a penalty he sets up his Rest there, and makes himself Judge of what he would have, and ought not to have more. And after a long debate where the Case of Whitchcot and Underhil was cited, it was ordered that the Plaintiffs do pay so much, with what was paid, as will make up the Penalty of the Judgment and Damages at 6 l. per Cent. for the Penalty and Costs here and at Law, and thereupon the Bond to be delivered up, and the Judgment vacated: But with this Proviso, that if 250 l. paid in November 1662. were paid before the Judgment entred into, and the Judgment entred after of that Term, that that must be taken as paid as Interest, because the Defendant received it on the Bond, the Judgment then not being entred, which a Master is to examine; and if he find it, to allow the same as paid on the Bond for Interest, and the Master to take the Account.

Monies paid before actual entring of the Judgment is to be taken as paid on the Bond tho' the Judgment be of a Term before the payment.

So Judgment on a Bond worse Security than the Bond only.

So note, That a Judgment on a Bond, on which there is more due than the Penalty for Principal and Interest, is worse Security than the Bond only.

The

The Lord Chancellor.

Smith *againſt* Oxenden.

THE Caſe was, The Eaſt-India Company ſued their Factor for an Account of 12000 l. in Gold he carried hence into the Eaſt-India. He upon his Account demanded (according to the uſual Cuſtom) allowance for ſo much paid for Cuſtoms to the King in India. It was inſiſted, that he never paid the Cuſtoms there for the Gold, ſo whether the Factor or the principal Merchant ſhould have the benefit of the Cuſtoms was the Queſtion.

And this was referred to Merchants. And two Merchants certified, that by the courſe of Merchants the Factor ſhould retain the benefit of the Non-payment of the Cuſtoms, for that if the principal Freight by his Non-payment of the Cuſtoms had been loſt he muſt have anſwered for it to the Imployer, and ſo run the hazard wholly. And in this Caſe the Factor, by the Law in Eaſt-India, had it been diſcovered that he had concealed the Gold, and not entred it into the Cuſtom Books, was to have loſt his life as a Felon.

Two other Merchants certified that the Imployer was to have the benefit of the Non-payment of the Cuſtoms: And upon theſe Certificates, it was decreed that the Factor ſhould have the benefit of the Cuſtoms, for it was a Duty to be paid, and the Imployer could make no Title to it againſt him that was in poſſeſſion; and he that hath Poſſeſſion hath Right againſt all but him that hath the very Right. Vide Borr againſt Vandale.

The Factor ſhall have the benefit of Cuſtoms ſaved and not the Imployer.

Randal *againſt* Richford. June 2.

A Witneſs alledged he had miſtaken himſelf at a Commiſſion. The Commiſſion being returned, he came to London, and made Oath that he was ſurprized. A ſpecial Commiſſion iſſued to re-examine the Witneſſes, which was done accordingly; but this ſpecial Commiſſion was ſurprized by Motion, by advice of the Maſter of the Rolls with the ſix Clerks, as contrary to the courſe of the Court.

DE
Term. Sanct. Mich.
Anno Regis 15 Car. II.
IN
CANCELLARIA.

Chief Justice Hide.

Sheldon *against* Weldman. October 11.

On a Plea.

THE Bill was to have an Account of Mony delivered by the Plaintiffs Father (whose Executor the Plaintiff was) to the Defendant to compound for the Plaintiffs Fathers Estate (sequestred for Delinquency) at Goldsmiths-Hall.

Mony upon a Trust out of the Statute of Limitations.

The Defendant pleaded the Statute of Limitation of Accounts 21 Jac. 16. Upon arguing his Plea it was insisted by the Plaintiffs Counsel, That an account for Monies delivered upon a Trust was not within this Statute, and that it had been so ruled; and thereupon the Plea was overruled and the Defendant ordered to answer.

Lord Chancellor
Justice *Windham.*
Justice *Twisden.*

And in Trinity Vacation 16 Car. 2. The Case being heard by the Lord Chancellor, Justice Twisden, and Windham, the two Judges and the Lord Chancellor declared and were of Opinion, That the Statute of Limitations did not barr this Suit; because it was on a Trust that the Defendant had the Mony for which the Account was sought. But for another reason the Bill was dismist.

The

The Lord Chancellor.
Chief Juſtice Hide.

Nanney *againſt* Martin. October 15.

Baron and Feme have a Decrée for Mony in the right of the Wife, and then the Baron dies; A Queſtion is moved who ſhall have the benefit of the Decrée, Whether the Wife or the Executor of the Husband.

And this Caſe being referred to Chief Juſtice Hide, he had given his Opinion, that the benefit of the Decrée belongs to the Wife, and that it was ſo in a Judgment at Law. And Exception being taken to that Certificate of the Judge, he refuſed to hear the matter of the Exception, but left it to the Chancellor; but declared his Opinion was ſtill the ſame. And 18 Jan. 1663. at the Seal the Lord Chancellor would not refer it back, but confirmed the Judges Certificate.

The benefit of a Decree by Baron and Feme belongs to a Feme, and not to the Executor of the Husband.

Chief Juſtice Hide.

Gervas Scroope *an Infant againſt Sir* Adrean Scroope. October 15.

A Bill was to be relieved touching the Manor of Gidley in Lincolnſhire, and ſets forth that Gervas Scroope deceaſed, Father of the Defendant, and Grandfather of the Plaintiff, was ſeized in Fée thereof, and deviſed the ſame to the Plaintiff and his Heirs, and that the Defendant having gotten all the Writings, laid claim to the ſame, and got into poſſeſſion thereof, and did pretend that the ſaid Manor was purchaſed heretofore in the Name of the ſaid Sir Gervas and him, and to their Heirs, and that ſo; Sir Gervas had no power, being Jointenant, to deviſe the ſame, whereas his, the ſaid Defendants Name was uſed in the ſaid Conveyance in Truſt for the ſaid Sir Gervas, and the Purchaſe was made and the Mony paid by Sir Gervas, and that ſo the

Defendants Title was but as a Truſtee for Sir Gervas, and conſequently for the Plaintiff to whom Sir Gervas had devi-ſed the ſame.

The Defendant pleaded that the Premiſſes were the 19th of June 13 Car. 1. by good Conveyance in Law well executed for 4600 l. really and bona fide paid, conveyed by J. S. to Sir Gervas Scroope and the Defendant and their Heirs, the Defendant being the Son and Heir apparent of Sir Gervas, and that the ſaid 4600 l. was raiſed by Sir Gervas by ſale of the Lands, which were the ancient Inheritance of the Family, and which, if they had not been ſold, had deſcended on the Defendant, and averred that all the Courts of the ſaid Manor that were kept in Sir Gervas's Life were kept in as well the Defendants Name as in Sir Gervas's Name, and that the ſaid Condeyance to Sir Gervas and him was really and bona fide without any Truſt for Sir Gervas or any other. And that Sir Gervas being dead the Defendant claimed the Premiſſes by Survivorſhip, and demanded Judgment.

The Plaintiff did not attend, but was alledged to be out of Town, and prayed it might ſtand for another day. But the Court directing the Plea to be opened, which was done, and afterwards read, declared it clearly to be a good Plea, unleſs the Plaintiff could prove an expreſs Truſt; and if he could have done that, he ought to have replyed; but not having replyed, the Plea muſt be taken to be true; and that albeit the Purchaſe was made by the Father in his own and his Sons Name, it ſhould prima facie be intended an advancement for the Son, and not preſumed a Truſt, unleſs declared ſo, and that it was anciently the way to join the Son in a Purchaſe to avoid Wardſhip. And the Caſe of Criſp againſt Prat, 3 Cro. 550. and Sir Sidney Montagues Caſe there, were in the Debate of this Caſe urged, and the Court declared to the Defendants Counſel, this being the Caſe, that nothing could be ſaid againſt the Plea, and ſo allowed it. 17 November, 1663, the Plea was re-heard, and upon Argument on both ſides was allowed with double Coſts.

The Father joyns the Son with him in the Purchaſe, it ſhall not be preſumed a Truſt in the Son, unleſs it be expreſly declared.

The

The Lord Chancellor.
The Maſter of the Rolls.

Chute *againſt the Lady* Dacre, October 23.

THE Defendant having miſtaken her ſelf in her Anſwer, as was alledged, having therein ſworn ſomething which was found afterwards by her to be otherwiſe, It was alledged by her Counſel, and Affidavit made by her ſelf too for that purpoſe, that thoſe matters untruly ſet forth were added in the Margent of the Draught after ſhe had peruſed it, and ſo ſhe was thereby ſurprized: And it was alledged that no Replication was filed prout Certificate, and Affidavit, of notice of this Motion to the other ſide was read. But the Plaintiff making no defence, it was ex parte on the Defendants motion, ordered that ſhe be at liberty to amend her Anſwer in the ſaid matters miſtaken. And it was ſaid that like liberty had been given to a Defendant to amend his Anſwer before Replication in a Caſe between Chettle and Chettle in the Lord Coventry's time.

Liberty given the Defendant to amend her Anſwer, ſhe being ſurprized therein.

At the Rolls, *the Maſter of the* Rolls.

Manning *againſt* Burges. October 26.

A Mortgage was forfeited, the Mortgagor afterwards meeting the Mortgagee, ſaid, I have Monies, now I will come and redeem the Mortgage. The Mortgagee ſaid to him, He would hold the mortgaged Premiſſes as long as he could, and then when he could hold them no longer let the Divel take them if he would. And afterwards the Mortgagor went to the Mortgagees Houſe with mony more than ſufficient to redeem the Mortgage, and tendred it there; but it did not appear that the Mortgagee was within, or that the Tender was made to him: And it was decreed a Redemption, and the Defendant to have no Intereſt from the time of the Tender, becauſe of his willfulneſs.

A Mortgagor refuſing to receive his Mony on Tender after Forfeiture, ſhall loſe his Intereſt from the Tender.

A like Caſe between Peckham and Legay about a year ſince.

The

The Lord Chancellor.
The Maſter of the Rolls.

Borr *againſt* Vandal. October 27.

THE Factor had ſtollen the Cuſtom of divers Gwds of which the Bill was to have an account, and to diſcover whether he paid thoſe Cuſtoms or no. The Defendant by Anſwer inſiſted that he was not bound to anſwer that part of the Bill, for that the Plaintiff, who was the Imployer, was not intituled to thoſe Cuſtoms, nor any advantage whether they were paid or not. Exception being taken to this Anſwer; The Maſter certified the Anſwer ſufficient. Exceptions being taken to the Report: The Cauſe came now to be heard upon that. And the Cauſe of Smith and Oxenden, fol. 25. was cited. But on the Plaintiffs ſide, it was inſiſted that this Caſe was not like that, for that was of Cuſtoms ſtolen from a foreign King, and this was of Cuſtoms ſtolen from our own King, and that it would be of evil conſequence, and an Encouragement to evil Factors, if the Court ſhould give an Opinion for them in a matter of Fraud, as this was. And whereas it was inſiſted by the Defendants Counſel, That it was the courſe of Merchants that Factors ſhould have the benefit of Cuſtoms themſelves, and not the Principals, becauſe the Penalty would fall on the Factor if diſcovered: It was declared that could not be called a Cuſtom, being grounded upon Fraud. And therefore the Court ordered that the Defendant ſhould anſwer whether he paid the Cuſtoms or not. Vide Smith againſt Oxenden, fol. 25.

Whether Factor or Imployer ſhall have the benefit of the Cuſtoms ſtollen by the Factor.

The

The Lord Chancellor.

Rich *againſt* Jaquis. October 29.

RIch was Plaintiff upon a Certiorari Bill to remove a Cauſe out of the Mayors Court, his Witneſſes being out of that Jurisdiction, and the Bill here was for an Account touching other matters. Witneſſes being examined the Defendant moved for a Procedendo, and inſiſted upon it, for that if the Cauſe ſhould be heard here, he could not be relieved, not having any Bill here, being here but Defendant, though Plaintiff in the Mayors Court.

Whereunto the Plaintiffs Counſel inſiſted, that no Procedendo ought to be, for that this Bill containing other matters could not be determined upon the Bill in the Mayors Court, and that the Bill could not be divided; and that the Plaintiff in the Mayors Court might file his Bill in the Mayors Court in this Court, and direct it to the Chancellor, and have the ſame remedy here as he could there. *Certiorari* Bill brought to hearing.

Ordered that the Cauſe ſtand to be heard on the Bill in this Court. And after hearing the Cauſe was diſmiſt out of this Court.

The Lord Chancellor.

Jew *againſt* Thirkwell. October 30.

THE Plaintiff was Leſſee of divers Lands, whereupon an intire Rent was reſerved. Afterwards the Inhabitants of the Town, where part of the Lands lay, claimed Right of Common in part of the Lands ſo let; and upon a Tryal of their Right are found to have Right of Common there. Now this being but a Right of Common recovered, is no Eviction of the Land in Law, becauſe the Soil was not recovered, and ſo no Apportionment could be at Law; and therefore the Bill was to have the Rent apportioned in Equity.

And

Apportioment of Rent in Equity where it cannot be in Law.

And Serjeant Maynard insisted, that such Apportionment had frequently been Decreed here. But in this Case it appearing, that notwithstanding the Right of Common the Lands were worth the Rent reserved, and better, the Court would not Decree it, but the Bill was dismist.

Wolestoncroft *against* Long. November 6.

Debts on Bond and simple Contract, to be paid in equal Proportion where Lands are to be sold for payment of Debts. So of Debts and Legacies.

A Debtor upon Bonds and simple Contract makes a Conveyance of Lands upon Trust to sell for payment of his Debts. It was declared to be the constant practice, and so ruled and decreed here, that all the Debts should be paid in proportion; and that if the Lands were not sufficient to pay all, all should lose in proportion. And so it is where Lands are given to pay Debts and Legacies, they shall be paid in equal proportion, because the Land is made lyable to the one as well as the other by the Debtor himself. But otherwise it is in Case of Debts and Judgments, that in their own nature charge the Lands.

The Lord Chancellor.

Baker *against* Beaumont. November. 6.

One in the Fleet for breach of a Decree, for not vacating of a Judgment, by Judgment in a feigned Action in the Kings Bench gets himself turned over thither, and so had liberty to go abroad, and got the Defendant in the Judgment taken in Execution in Exon, and on a Habeas Corpus he was brought hither, and recommitted to the Fleet, and confined to his Chamber, and a Habeas Corpus with a long Return for the Defendant in the Judgment, granted.

The

The Lord Chancellor.
The Maſter of the Rolls.

Ayre *againſt* Ayre. November 10.

THE Plaintiff being the Widow of her Husband, ſued the Defendant, who was his Executor, to have allowance of a ſatisfaction for ſeveral Debts of the Teſtators (which ſhe, having poſſeſt her ſelf of his Eſtate, had paid) the Executor having gotten all the Eſtate out of her hands. It was much controverted, Whether ſhe could be helpt herein; for though Executor of his own wrong ſhall be allowed all payments made to any but himſelf, yet ſhe was not Executrix of her own wrong; for where there is a rightful Executor, as here, there can be no Executor de ſon tort. Yet it reſembled that Caſe; and the Court doubting much what to do in this Caſe, decreed by conſent of Counſel, That ſhe ſhould be allowed for all payments that ſhe had made which were incumbent on the Executor to pay according to the courſe of Law; but that if ſhe had made any payments out of Order and Rule that the Law left the Executor lyable to, that ſuch payments ſhe ſhould not be allowed for, if they were to the prejudice of the Executors.

A Widow paying juſt Debts of her Husband out of his Eſtate in her hands, ſhall have allowance for the ſame from the Executor.

In Court.

Sackvile *againſt* Dobſon. November 10.

LImitation of the Truſt of a Term to Husband and Wife and the longeſt liver of them, for life, and after to the eldeſt Iſſue of them, none being then born; a good Limitation. So the Limitation to Husband and Wife is but one Limitation; and ſo it was admitted by Counſel, it being not controverted; for though the Truſt of a Term according to the Rule in Goring and Bickerſtaffs Caſe, fol. 4. may be limited to divers perſons that are in being one after another, becauſe the ſame is transferrable, yet it cannot be good beyond two Limitations to a third perſon not in being:

Limitation to Husband and Wife is to be accounted as one Limitation in the Truſt of a Term.

Perpetuity.

being: Ergo, The Limitation to Husband and Wife, and longeſt liver of them, was admitted to be but one Limitation in this Caſe.

The Lord Chancellor.
Juſtice Tirrel.

More *againſt* Mayhow. November 10.

THE Plaintiffs Bill was to be relieved upon a Truſt, and charged the Defendant with notice of that Truſt, and that he had gotten a Conveyance of the Lands upon which the Truſt was had; and that at or before his taking the ſaid Conveyance, he had notice of the ſaid Truſt for the Plaintiff.

The Defendant by way of Anſwer denied that he had any notice of the Truſt at the time of his Purchaſe or Contract, and pleaded that he was a Purchaſer for a valuable conſideration. It was inſiſted the Plea was not good becauſe he did not ſay what the valuable conſideration was; for 5 s. was a valuable conſideration, but yet no equitable conſideration.

Purchaſer without notice.

The Court declared that the Plea in this Caſe was well enough.

It was farther inſiſted, that the Plea was founded upon the Anſwer, viz. That the Defendant had no notice, &c. And that the point of notice was not well anſwered, in that the Defendant denied notice at the time of the Purchaſe only, and the word Purchaſe might be underſtood when the Contract for the Purchaſe was made, and it might be he had no notice then, and might have notice after, before, or at ſealing of the Conveyance: And if there was any notice before the Conveyance to him executed, that ſhould charge the Defendant: And that it was ſo lately decréd in a Cauſe betwéen Sir William Wheeler and .... and Yarraway, and Nicholas, by the Lord Chancellor. And ſo the Plea was over-ruled.

Notice of an Incumbrance any time before the Conveyance executed ſhall bind him.

Garfoot

Garfoot *againſt* Garfoot. November 10.

On a Demurrer.

LAnds were deviſed to the Feme for Life, afterwards to be ſold by the Executor for younger Childrens Portions; the Executor dies, the Feme dies; the younger Children prefer their Bill againſt the Heir. He demurs, becauſe but an Authority in the Executor, which is dead with them; but the Demurrer was over-ruled.

Lands deviſed to be ſold by Executor who dies; the Bill brought againſt the Heir, who demurs, and over-ruled.

Regnes *againſt* Lewis. November 17.

On a Demurrer.

THE Demurrer was, for that a Feme Covert ſued without her Husband. But ſhe being to be relieved touching a ſeparate Maintenance agreed to by her Husband, the Court overruled the Demurrer, declaring the Feme might ſue without her Husband.

Wife ſues for ſeparate Maintenance without the Husband.

The Lord Chancellor.
Baron Turner.

Churchil *againſt* Grove *and others.* Nov. 24.

On a Plea.

THE Plaintiff having a Judgment and a Mortgage, exhibited his Bill againſt the Mortgagor, and Conuſee of a Statute by the Mortgagor, to have a diſcovery what is due on the Statute, that being precedent to the Plaintiffs Securities, and upon payment to have the ſame ſet aſide.

Purchaſer without notice.

The Cognizée pleaded that he having extended his Statute, and the Cognizor and he stated Accounts, and the sum of 3000 l. being due to him, he in consideration thereof had an absolute Conveyance of part of the extended Lands, and shewed what Lands were conveyed to him by the Cognizor, and that thereupon he assigned the residue of the extended Lands to the Cognizor, and that so he was a Purchaser without notice of the Plaintiffs Title for a valuable consideration.

It was also pleaded that the Cognizor was in Execution on the Plaintiffs Judgment, and so the Plaintiff could not extend the Lands, nor the Lands be lyable during the life of the Cognizor.

On the Plaintiffs part, it was to the first point insisted, That it did not appear that the Defendant was a Purchaser, there being no new Mony paid upon the executing the Conveyance, but coming in for the consideration of Mony due on the Statute was no Purchase. And that it was Common Equity for him that had the subsequent Judgment to be relieved against the precedent Statute on payment of what was due, and that there was, for ought appeared, no more there; and that the Account made up betwéen the Cognizor and Cognizée on the pretended Purchase, ought not to affect the Plaintiff; and that therefore the Defendants Purchase, being subsequent to the Plaintiffs Security, ought not to be aided by the Statute; and that the Plaintiffs Judgment being of Record, the Defendant was bound to take notice thereof at his peril; and that in this Case the Defendant ought not to protect his pretended subsequent Purchase by his precedent Statute, but that he ought, upon payment of the Statute, to yield Possession to the Plaintiff.

But this was strongly opposed by the Defendants Counsel, who insisted that the Defendat was a Purchaser, and that though no new Mony was advanced on the Purchase, yet he assigned over and parted with part of the extended Lands in consideration thereof, which was as valuable as Mony. And that it was the constant Justice of this Court, That if a Purchaser bona fide did buy in an eigne Incumbrance, Statute or Judgment, and there were a Judgment or Statute mesne betwéen that and his Purchase, of which he had no notice at his Purchase, That he should protect his Purchase with the eigne Incumbrance so bought in. And it was insisted, that though Judgments were on Record,

Purchaser shall protect his Purchase by buying in an eigne Incumbrance.

cord, and a Purchaſer is bound to take notice thereof at Law; yet in Equity where the Cognizée of a Judgment comes to be helpt to extend his Judgment againſt a Purchaſer, he muſt prove expreſs notice of the Judgment in the Purchaſer, or elſe ſhall never be relieved againſt the Purchaſer. And upon this Point the Plea was allowed. And as to the other Point, That the Cognizor being in Execution upon the Judgment, and ſo the Land not to be charged during his life; It was ſtrongly inſiſted, that was no good Exception in Equity, for that the Bill was to diſcover Incumbrances, which the Plaintiff could not have after the Cognizors death. And it was poſitively affirmed, that it had bé'n ruled here, That a Bill will lye notwithſtanding the Debtor was in Execution upon the Judgment. But this Point was not much debated. Howbeit the Court inclined in Opinion, That this part of the Plea was not good.

Purchaſer ſhall not be affected by a Judgment in Equity without expreſs notice of it before the Purchaſe.

Whether the Cognizee of a Judgment having the Cognizor in Execution can bring a Bill whilſt he lives to charge the Lands.

Williams *againſt* Arthur. November 24.

On a Plea and Demurrer.

A Decretal Order was produced in 1657. for ſeveral matters; and then after the Cauſe had depended on account three years, a Decrée was drawn, wherein the firſt decretal Order was recited, but part of the matter thereby decreed was omitted in the decretal part of the Decrée it ſelf; and ſoon after the Decrée ſigned and inrolled the Defendant died: A Scire Facias was ſued to revive, and in the proſecution thereupon the Plaintiff diſcovered the omiſſion, and ſo could not have the benefit of that part which was omitted in the Decrée that way, and the Defendant being dead could not help that Omiſſion, by a motion upon the ſurprize. The Bill now was a Bill of Reviver to revive ſo much of the Decrée as was omitted as was alledged; howbeit in truth the Bill was to the whole Decrée.

It was pleaded that the Decrée being inrolled, a Bill of Reviver did not lie, but a Scire Facias. Ordered that the Plea and Demurrer be overruled.

Part of the matters being omitted in drawing up the Decree, a Bill of Reviver lyeth to revive thoſe matters.

Chief

Chief Juſtice Foſter.
The Maſter of the Rolls.

Merry *againſt* Abney *the Father, and* Abney *the Son, and* Kendal. November 26.

All which were heard on *Abney* the Sons Plea, about *Trin.* 12 *Car.* 2. and the ſame Cauſe heard this day.

KEndal contracted with the Plaintiff to ſell him certain Lands in Leiceſterſhire. Afterward Abney the Father, who lived near the Lands, in behalf of Abney the Son (a Merchant in London) purchaſeth thoſe Lands of Kendal, and had a Conveyance from Kendal to Abney the Son and his Heirs. The Plaintiffs Bill was to be relieved upon his Contract with Kendal, and againſt the Conveyance to Abney, and charged notice of his Contract to both the Abneys. Abney the Son, pleads himſelf to be a Purchaſer bona fide, without any notice of Kendals Contract with the Plaintiff, and without any Truſt for his Father.

The Court declared, That notice to the Father in this caſe was notice to the Son, and ſhould affect the Son, who was the Purchaſer. So that notice of a dormant Incumbrance, to a party that purchaſeth for another, ſhall affect the very Purchaſer: And accordingly was this Cauſe decreed, it appearing at the hearing that Abney the Father had notice of Merry's Contract before he purchaſed for his Son.

Notice to him that purchaſeth for another ſhall affect the Purchaſer himſelf.

The Maſter of the Rolls.

Seabourne *againſt* Blackſtone. November 26.

THE Wife received mony due on a Bond entred into by one to her Husband: She uſually received and paid mony: He got Judgment on the Bond; Ordered that he acknowledge ſatisfaction thereupon.

The

The Lord Chancellor.
The Maſter of the Rolls.

Davie *againſt* Beardſham *and his Wife.*

DAvie agrées for the Purchaſe of certain Copyhold Lands, which were ſurrendred out of Court to his uſe; but before Admittance he dies, having other Copyholds, and having made his Will after the ſaid Contract, and thereby deviſed to the Plaintiff (who was then and at his death his viſible Heir) all his Copyholds after his death; his Wife being priviment enſeint at his death is delivered of the Defendants Wife, who then becomes the Heir of the Deviſor. The Plaintiff taking it for granted that the Copyholds ſo contracted for, did not paſs by the Will, ſuffered the Heir to be admitted thereunto, and held the ſame of the Heir for twenty years, and paid her Rent for that time, and had agréed ſo to do as long as he ſhould hold them. Afterwards differences ariſing betwéen the Heir and him about other matters, the Plaintiff exhibited his Bill (inter alia) to have thoſe Copyhold Lands decréed him. And it was declared upon the hearing, by the Court, That it was clear the ſaid Copyholds ſo agréed for did paſs by the Will to the Plaintiff, for that the Purchaſer had an Equity to recover the Land, and the Vendor ſtood truſted for the Purchaſer, and as he ſhould appoint, till a Conveyance executed. And the Caſe of the Lady Fohaine about 1657. was cited, where it was ruled, That if upon Articles for a Purchaſe, the Purchaſer dyeth, and deviſeth the Land before the Conveyance executed, the Land paſſeth in Equity. But in the principal Caſe, inaſmuch as the Plaintiff had admitted the Title to be in the Heir, and paid her Rent, and agréed ſo to do, the Court would not decréé it; but declared if the Plaintiff had come in time it was proper to be decréed.

Lands contracted for, paſs by Deviſe of the Purchaſer.

Vendor after Contract to purchaſe ſtands truſted for Vendee.

Jones *againſt* Done.

IN which Caſe a Decrée was made, whereby it was decréed, That an Office was extendible in Law or Equity.

An Office extendible.

Biſhop

Biſhop *againſt* Biſhop.

Award. AN Award confirmed in part, and made void in part.

The Lord Chancellor.
The Maſter of the Rolls.

Guilbert *againſt* Hawles. 12 & 17 Feb. 14 Car. 2.

THE Bill was to be relieved againſt an Action for Rent, and at the hearing of the Cauſe it was decreed to account, and that the Plaintiff ſhould pay what was due to the Defendant on account; the Account was ſtated by a Maſter; then the Plaintiff moved to diſmiſs his Bill paying what Coſts the Court would aſſeſs, which was oppoſed, for that the Judgment of the Court being given, the Plaintiff ought not to abuſe the Court and depart from it; and the Caſe of Wingfield and Thomas was cited, whereby upon an Obligation here the Plaintiff here was decreed to pay Principal, Damages and Uſe, and afterwards the Plaintiff there would have diſmiſt his Bill, but it was denyed.

After a Decree the Plaintiff may not diſmiſs his Bill.

Churchil inſiſted that Quilibet poteſt renunciari juri pro ſe introducto.

The Maſter of the Rolls directed it to be moved before the Chancellor, and 17 Feb. it being moved before him, it was denyed, and the ſaid Chancellor and Judge Brown in 17 Car. 2. between Cheatly and Packington gave the like Rule in the ſame Caſe.

Edgworth *againſt* Davies. 1 July 14 Car. 2.

Upon a Plea.

THE Bill was to have an account of the profits of Land which the Defendant had received on Truſt for the Plaintiff during his minority, and for monies received upon Bonds, belonging to the Plaintiff, and for Writings, &c. The Defendant pleaded that the Lands lay in Cheſhire, and that the Defendant lived in Cheſhire in the County

County Palatine of Chester and Lancashire, and therefore not within the Jurisdiction of this Court. This Plea having bèn formerly argued before Judges in absence of the Chancellor, They ordered Presidents to be produced, which were as follows: Hern against Smith 12 Eliz. for that the Lands lay within the Dutchy, was over ruled. Sherborn against Vaughan, 13 May 14 Car. the Bill was to be relieved on Trust; the Defendant pleaded the Jurisdiction of the Dutchy, this was ex parte, but in my Lord Coventry's time. Hales against Daniel 24 Octob. Car. 1. ad idem. In which Case the thing being for a personal Estate the Court over-ruled the Plea of the County Palatine; and in the same Cause Mr. Page, to whom it was referred to certifie, reported upon the view of Presidents, that the Jurisdiction of the Counties Palatine was allowable betwæn parties dwelling in the same County and for Lands there, and for matters local. And in the Argument of the principal Case was cited the Case of Sir John Egerton and the Earl of Darby; and upon long Debate in the principal Case the Plea was over-ruled, but without Costs.

Plea. Jurisdiction of the Dutchy overruled without Costs.

The Lord Chancellor.
Baron Turner.

Clark *against the Lord* Angier. 3 July, 14 Car. 2.

Upon a Demurrer.

A Legacy being given to a Feme Covert, who was Covert when the Legacy was given, the Husband of the Wife without her, exhibits a Bill for it, because, the Wife was no party; The Defendant demurred, for of things mærly in Action belonging to the Wife, as a Bond, &c. she ought to join in Suit; but otherwise it is of a Rent running in the Wifes Right after Marriage. If the Husband alone should sue the Bond and be non-suited or dismissed, that will not conclude the Case; but if he dye before Judgment or Decrèe, the Wife cannot revive the Suit.

Where a Feme Covert ought to join in a Title, Suit, &c. and where not.

Parker *againſt* Palmer.

Upon an Appeal from a Decree at the *Rolls*. 27 Januar. 14 Car. 2.

PArker ſold a Leaſe, which he had from the Dean and Chapter for three Lives, to Palmer, &c. and it was agreed Palmer ſhould pay 4320 l. for it. After the Defendant agreed with the Plaintiff that if he would abate him 420 l. he would reconvey the Leaſe whenever the King and Dean and Chapter were reſtored. The Plaintiff thereupon abated the 420 l. and the King and Church being now reſtored, the Plaintiff exhibited his Bill for the Leaſe, which the Maſter of the Rolls decreed to him.

Agreement tho' the Conſiderations be unequal, decreed.

Note, That this was decreed againſt the Son of the Purchaſer, the Father being dead.

The Queſtion was, Whether he came in by Settlement, or as Occupant?

Upon Appeal to this Decree it was affirmed by the Lord Chancellor and Bridgman. And in this Caſe it was objected, that this Court ought not to decree that, for 'twas but in the nature of a Wager, and the conſideration unequal and penal, and that an Action more properly lay, and that it was at the diſcretion of the Court to decree an agreement, or not, when it ought to be performed ex debito Juſtitiæ: Yet it was Decreed ut ſupra.

The Lord Chancellor.

Savil *againſt* Darrey.

Mony decreed by Rule of Court to be paid before a Bill of Review: But upon giving Security to pay it, the Rule diſpenſed with.

A Decree was obtained for a great Sum of Mony: A Bill of Review was brought, and new matter aſſigned. The Rule of Court was pleaded, that the Defendant ought firſt to pay the Mony before the Bill ſhould be brought into Court. Let him give good Security for the Mony, and we will diſpenſe with the Rule. The like Caſe between Baſton and Biron, by Order of the Houſe of Peers, about 1662.

DE
Term. Sanct. Hill.
Anno Regis 15 & 16 Car. II.
IN
CANCELLARIA.

The Master of the Rolls.

Curteſs *againſt* Smalridge. January 26.

THE Defendants Wife had pawned her Husbands Plate to the Plaintiff for 110 l. The Defendant in Trover for this recovered 115 l. damages againſt the Plaintiff, and Judgment for it. A Bill was to be relieved againſt this Judgment, for that the Defendant was privy to the pawning, and had the 110 l. and the proofs being read, it appeared that the Defendant had confeſt ſo much, which if it had been proved at the Trial, it was agreed the Defendant could not have recovered in the Trover, and there being no proof now that the Defendant at Law could not by reaſon of any accident have his Witneſſes at the Trial, the Court would not on any neglect of his grant a new Trial.

And it was inſiſted upon as a Rule, that nothing ſhall be a ground to direct a new Trial to avoid a Judgment at Law, that would not be ground for a Bill of Review to reverſe a Decree, and a Confeſſion ſubſequent to a Decree no ground for a Bill of Review; nor is the want of any Evidence or Matter which might have been uſed in the firſt cauſe,

Rule or Maxim. Nothing a ground for a new Trial after Judgment, that is not ground for a Bill of Review.

cauſe, and of which the Party had then knowledge, any ground for a Bill of Review: And here is no proof but that the Plaintiff might have had the Witneſſes that were examined here at the Trial; and ſo this Cauſe was diſmiſt.

The Lord Chancellor.
Baron Turner.

Read *againſt* Hambey. February 18.

On a Demurrer.

THE Bill was to explain a Decree, wherein the Caſe was, One ſeiſed of the Manor of Wrangle worth near about 110 l. per annum, and another of a Farm in Wrangle held of the ſame Manor, worth 250 l. per annum, and the Fee of both came after into one Perſons Hands, he having articled to ſettle the Manor of Wrangle worth 110 l. per annum with the Improvements. It was on the Articles decreed, his Heir ſhould convey the Manor of Wrangle, with all the Improvements to the Plaintiff in the firſt Suit; And if the Manor was not worth 110 l. per annum, it ſhould be made up out of the other Lands. By this Decree and unity of poſſeſſion of the Manor and Farm the Plaintiff claimed all the Manor and Farm, and the Bill being to explain the Decree, charged the Farm to be worth 250 l. per annum, and the Manor 110 l. per annum, and therefore prayed to have the Decree explained, whether the Decree intended all, or only the Manor according to the Articles. The Demurrer was, for that it was an Original Bill, and ſought to alter or change the Decree.

For the Plaintiff it was inſiſted, That the Plaintiff was without any poſſibility of help but by this Bill, for that it being to be relieved upon a Fact not in Iſſue, nor appearing in the former Cauſe, a Bill of Review would not lie for it; and that the Defendant by having demurred, had admitted the Bill to be true, and then the Caſe was, that the Lands claimed without the Decree were worth 400 l. per annum, whereas the Articles on which the Decree was founded, were but for 110 l. per annum, and therefore it was ſtrongly urged, that they ought to anſwer.

For

For the Defendant it was replied, that no Original Bill ought to explain a Decree upon any matter precedent to the Decree; and the consequence of that was alledged to be dangerous; for it would be introductive of a means to blemish and hinder the execution of a Decree. And as to the hardship of the Decree, or intent of it, it was insisted, that that would be fit for determination upon an Execution for non-performance, where the Defendant might see out what he had to say for his excuse, and then it would be proper for the Court to declare what was the intent of the Decree, and that the Justice or injustice of the Decree might then be determined. And of this Opinion the Court seemed to be. But the Plaintiffs Councel insisting, that the Defendant would be bound in a Prosecution on the Decree by the Letter of it, and could not then put any interpretation on it against the Letter of it, they therefore prayed leave of the Court to set forth the Special Matter on Examination; which the Court would not give an Order for. And as to the Plaintiffs Objection, that the Demurrer admitted the Bill, and so ought to have an Answer, because the Manor and Lands were of the value, ut supra, It was answered by the Defendants Councel, Alligari non debuit, quod probatum non relevat, and the Demurrer was allowed. Then the Plaintiffs Councel prayed the signing and inrolling of the dismission on the Demurrer might be stayed till the Plaintiff was examined on Interrogatories for breach of the Decree, &c. But the Court denied it.

Original Bill not to be admitted to explain a Decree upon a Fact precedent.

Non debet alligari quod probatum non relevat

DE
Termino Paſchæ
Anno Regis 16 Car. II.
IN
CANCELLARIA.

Bawtrey *and his Wife againſt* Ibſon. May 4.

WIlliam Ibſon being poſſeſſed of a Term for years from the Vicars Choral of York, aſſigned the ſame to Truſtees, and then buys the Inheritance from the Truſtees for ſale of Church Lands: And before Marriage covenants to ſtand ſeiſed to the uſe of Himſelf and Wife for life, for a Jointure.

In 1659. William Ibſon dyed, having made his Will; After his death his Relict entred and held the Lands, and then upon agreement with his Executors for Mony paid, releaſed to them the Perſonal Eſtate of the Teſtator, and all demands for the ſame. Soon after the King being reſtored, the Title of the Inheritance under the ſaid Purchaſe became void. The Widow married the Plaintiff, and they two brought their Bill againſt the Executors of William Ibſon and the Aſſignees and Truſtees of the Leaſe, and it was to the end that though the Inheritance was evicted they might hold for ſo long of the Term as the Joynturels ſhould live, and that the Releaſe might not bar her of that, becauſe not intended when the Releaſe was given, nor was the Leaſe then looked on as part of the Perſonal Eſtate.

A Releaſe ſet aſide by a ſubſequent Accident having relation to the Original Equity.

1. Queſt.

1. Queſt. was, Whether the Inheritance being gone, the Leaſe, which was to attend it, ſhould go now according to the uſe in the Covenant to ſtand ſeiſed?

Reſolved in this Caſe, It being a Settlement in Marriage, and ſo on a Conſideration, it ſhould go to the Wife for ſo many years as ſhe lived. But it was ſaid, it would have been an other Caſe between the Heir and Executor of the Covenantees.

2. Queſt. If the Releaſe of the Demands to the Perſonal Eſtate ſhould bar the Feme of the benefit of the Term?

And it appearing by the proof that the Agreement which begot the Releaſe, was before the Title to the Inheritance was avoided, and concerning that which was then looked upon as Perſonal Eſtate, and not touching the Leaſe, and that notwithſtanding the Releaſe the Feme continued the Poſſeſſion: It was reſolved the Releaſe ſhould not bar or prejudice the Plaintiffs Title in right to the Leaſe. And it was decreed that the Plaintiff ſhould hold for ſo many years as ſhe lived, and that if the Leaſe were renewed ſhe paying proportionably to her Eſtate for life, that the Executor ſhould hold for ſo many years as ſhe lived, and then to go to the Executors.

A. ſeiſed of a Term for years, purchaſes the fee and then ſettles on his Wife for Jointure, & dies, the Wife releaſes to the Executors all her right to the Perſonal Eſtate, and afterwards the Fee is evicted, and notwithſtanding the releaſe the Wife decreed to hold during the Term.

The Lord Chancellor.
Judge Brown.
The Maſter of the Rolls.

Kinaſton *againſt* Maynwearing. May 4.

THE Plaintiffs were the Children of the Defendants Siſter, and the Defendants Mother, during his minority, as his Guardian managed his Eſtate. And as to the Lands in queſtion, it was pretended thoſe were ſetled by the Defendants Father on the Plaintiffs Mother, being the Defendants Siſter; and the Defendants Mother and Guardian for about two years before the Plaintiffs Mothers marriage put her into poſſeſſion of thoſe Lands, and

and upon her marriage articled that thoſe Lands ſhould be ſetled on her and her Heirs; and to thoſe Articles the Defendant, then an Infant, was a Witneſs. Upon this matter (tho' there was no proof of the Deed, whereby it was pretended the Defendants Father ſetled the Lands upon the Plaintiffs Mother) the Court decreed againſt the Defendant upon colour of Equity for want of the Deed, and yet there was no proof of a Deed, which was conceived very hard, for the Court to raiſe an Equity out of a Deed when it was not proved.

Equity raiſed out of a Deed which was not proved.

The Lord Chancellor.
The Maſter of the Rolls.

Thirveton *againſt* Collyer. May 11.

THE Bill was to have a Decree for an Incloſure upon an Agreement. It appeared by the Bill, that there were to be eighteen Allotments, and there were but fifteen Parties to the Suit: And ſo it was objected by the Defendants, that all the Parties to the Agreement, were not Parties to the Suit; and alſo that there were other Perſons that claimed Common in the Ground to be incloſed that were not Parties, either to the Agreement or Suit; and ſo to decree that Agreement would be to do a manifeſt Wrong, and be an occaſion of Suits and Quarrels.

Whereunto it was anſwered by the Plaintiffs, That tho' there were eighteen ſhares, ſome of the Perſons were to have two ſhares, ſo as that made up the eighteen, and that there were others had Common but by Vicinage; but nothing of this appear'd to be alledged by the Plaintiffs.

It was decreed nevertheleſs, That the Agreement for the Incloſure ſhould be perform'd, and a Commiſſion was awarded to ſet out each Perſons Title. And the Court decreed, That if there were any that had Intereſt, and were not Parties to the Agreement they could not be bound, and ſo at no prejudice: But however it ſhould not be in the power of one or two wilful Perſons to oppoſe a Publick Good.

Agreement to incloſe Common, Parties that have Intereſt in the Common, and not privy to the Agreement ſhall not be bound.

The

The Lord Chancellor.
The Maſter of the Rolls.
Juſtice Windham.

Goodrick *againſt* Brown. May 11.

1. RESOLVED, That whereas by a Decree of this Court a Fine was levied to a particular end and purpoſe, which would operate farther in Point of Law than to that end which the Decree ordered it, That ſuch Fine ſhould not be ſuffered in Equity to work farther than the Decree intended. Fines purſuant to a Decree ſhall work only according to the Decree.

2. That the Fine or Recovery of a Ceſtui que Truſt ſhould bar and transfer the Truſt, as it ſhould an Eſtate at Law, if it were upon a Conſideration: But otherwiſe Juſtice Windham doubted of it; for he ſaid he looked upon this Court as remedial to thoſe that come in upon a Conſideration, &c. Fine and Recovery ſhall work on a Truſt as on an Eſtate at Law.

3. That whereas the Perſon that ſuffered the Recovery was Tenant for life, in point of Law, and there had been an Agreement precedent to the Recovery, by the Anceſtor that was dead, for the ſetling of the Premiſes, ſo as to have made the Tenant for life Tenant in Tail, That the Recovery ſhould be good in Equity, and ſhould work upon the Agreement. Equity only remediable to thoſe that come in upon conſideration.

Againſt which it was objected, That the Recovery was a wilful Forfeiture in point of Law, and was voluntary, and no conſideration; and ſo the truth appeared, that the Defendant was as near in Blood to the firſt Anceſtor as the Plaintiff; and if this Court would maintain a voluntary Recovery of a Truſt raiſed upon a Conveyance, there was not ſo much in this Caſe, for here was but an Agreement, and tho' that Agreement might upon a Bill have been decreed, yet there being never any ſuch Bill, the Recovery ought not to be ſupported. As to this point and the ſecond the Judge would not deliver any Opinion, but the Court decreed it. A wilful Forfeiture by ſuffering a Recovery in point of Law ſupplied and holpen in Equity.

At the Rolls. *The Maſter of the* Rolls.

Scot *againſt* Rayner. May 11.

Iſſue, whether a perſon to whom an other had got Adminiſtration, was dead or not.

THE Defendant had ſued the Plaintiff at Law on a ſingle Bond entred into by the Plaintiff to the Defendants Husband, the Defendant ſuing there as Adminiſtratrix to her late Husband. The Bill here was, That in truth the Defendants Husband was not dead, and there appearing ſome probable Evidence that he was not dead, but concealed himſelf, and the Defendant pending this Suit, having got Judgment againſt the Plaintiff, the Court awarded an Injunction to ſtay Execution, and directed a Trial at Law to be, whether the Defendants Husband was dead, or not.

The Lord Chancellor.
Judge Brown.

Wan *againſt* Lake. May 12.

On a Demurrer.

THE Demurrer was to a Subpœna in nature of a Scire fac', and it was becauſe he that brought the Subpœna did not thereby alledge himſelf to be Heir or Executor to him that had the Decree.

A *Subpœna* no Record, nor ought to be demurred unto.

Reſolved that there was never any Demurrer of this nature before: And the Subpœna was no Record, nor any where filed, and ſo not to be demurred to; But the Cauſe was to be ſhewed upon the Return of the Writ on the Order, and the Order did mention him that brought the Writ, to be both Heir and Executor; ſo this Demurrer was conceived very ridiculous and over-ruled.

The

The Lord Chancellor.
Judge Brown.

Freak *againſt* Hearſey. May 12.

On a Demurrer.

THE Heir of the Mortgagee exhibited a Bill to have the Mortgagor pay the Mony, or to be decreed to make farther Aſſurance, and be fore-cloſed of Redemption. The Demurrer was, becauſe the Executor of the Mortgagee, who muſt have a Title to the Mortgage Mony, was no Party; and the Demurrer was allowed.

Executor of the Mortgagee ought to be a Party where the Heir was to have the Mony paid, or the Mortgage fore-cloſed.

In Court. The Maſter of the Rolls.

Glover *againſt* Portington. May 14.

JOſs Glover (the Plaintiffs Father) for ſecuring 50 l. per annum to Ann his Mother-in-Law for life, in lieu of 50 l. per annum which ſhe had chargable on other Lands of his which he was about to ſell, 11 May, 13 Car. 1. ſurrenders certain Copyhold Lands (of Gavelkind) to Thomas Roll (Brother of Ann) and his Heirs in Truſt for Ann, upon condition, that if Joſs Glover, his Heirs or Aſſigns, paid Ann 50 l. per annum during life, the Surrender to be void. Thomas Roll was admitted; Joſs Glover failing to pay the 50 l. per annum, 4 July, 20 Car. 1. Robert ſurrendred the Premiſes to the uſe of Ann for life, the Reverſion to himſelf and his Heirs (but in truſt for her and her Heirs) She was admitted: Thomas Roll died, the Premiſes deſcended to his Children and Grandchildren, ſome whereof yet Infants, and one a Lunatick. 22 Jan. 1651. Ann by Will directed that the Arrears of the 50 l. per annum ſhould be paid to her Executors (which the Defendant Portington is) to ſuch purpoſe as therein is expreſſed, and

declared that her Nephews the Sons and Grandchildren of Robert ſhould permit her Executors to receive the Rents and Profits towards payment of Legacies, and appoint her ſaid Nephew and Grandchildren, that if the Plaintiff (being Heir of Joſs Glover) ſhould within three years after her death pay her Executor all Arrears of the 50 l. per annum, that they ſhould ſurrender to the Plaintiff and his Heirs, and remit the Plaintiff 100 l thereof, and the Intereſt of the whole, ſo as he paid the Arrears in three years, and declared that if the Plaintiff fail'd to pay the Arrears in three years, the Premiſes ſhould be ſurrendred to her Executor; and the Arrears being paid, ſhe wills her Executor to pay the overplus to the Plaintiff, and to ſurrender to him: And in July 1654. Ann died, and in Febr. next following, the Bill was exhibited to have a diſcovery of what was paid, and that paying all Arrears but the 100 l. and Intereſt, he might have a Surrender from Rolls, who claimed the Eſtate to their own uſe. This Cauſe was through Infancy of the Defendant ſo delayed, that their Anſwers could not be gotten, and through abſence of the Plaintiff out of England which was nigh ten years; and now it was decreed, that if the Plaintiff would redeem, he ſhould pay all the Arrears and Intereſt.

Mortgagee remits by Will part of the Mortgage Mony, and all the Intereſt if the reſt be paid in three years. The Mortgagor failing to pay within 3 years loſes the benefit of the bequeſt.

Sergeant Fountain drew a Petition to the Maſter of the Rolls to Rehear it on the point of Intereſt, and afterwards moved it in Court; and the Lord Keeper (the Maſter of the Rolls being preſent) recommended it to him to Rehear it; and as to the point of the 100 l. of the Principal which was to be abated by Will, the Bill came within ſix months after the death of Ann, and it was not ſafe to go to Hearing without the Truſtees, whereby to have a Surrender, and they were in Infancy and Lunatick, which was the principal reaſon the Cauſe depended ſo long. Sergeant Fountain did upon a Diſcourſe between him and A. B. agree it was againſt the Plaintiff as to the 100 l. (tho Churchil was clear of another Opinion,) for Sergeant Fountain ſaid, That it being a voluntary Conditional Gift, the Plaintiff ought, if he would have the benefit of it, to have performed it by payment within three years, and ſought a reconveyance after. But as to the matter of the Intereſt, that was ſtronger, for that the Will appointed, that the Arrears being paid, the Land ſhould be ſurrendred to the Plaintiff; and it was ſaid the Teſtator intended a benefit to the Plaintiff by the appointment; and if he ſhould pay the

the Arrears and Intereſt, it was no benefit, for then the Premiſes without ſuch appointment ought to be ſurrendred to the Plaintiff, for the ſame were not forfeited above ten years when the Bill was exhibited.

The Maſter of the Rolls upon the Rehearing 25 June, Car. 2. confirmed the firſt Decree. Sergeant Fountain, Maſter Churchil, and Maſter Keck for the Plaintiff. Maſter Sollicitor Finch and divers others for the Defendants. And afterwards there was a Bill of Review to reverſe this Decree, to which Portington demurred, and inſiſted there was no Error in the Decree. And this Demurrer was argued in Trinity-Term 1665. before the Lord Chancellor and Baron Rainsford. And in the debate it was inſiſted by the Defendants Councel that this was a Bill of Review of a ſtrange nature; for that the Plaintiff, who had the Decree, did by his Bill of Review complain, that he had not enough decreed; whereas if a Review lies, it lies only for him againſt whom the Decree or Diſmiſſion is. After long debate the Demurrer was over-ruled.

DE

DE
Term. Sanct. Trin.
Anno Regis 16 Car. II.
IN
CANCELLARIA.

The Lord Chancellor.
Baron Rainsford.

Combs *againſt* Proud. June 16.

THE Bill was a Bill of Review, and in drawing up the decretal Order, the matter upon which the Decree was made, was declared to be proved, and the Case stated far different from the Fact.

Matters assigned for Errors in a Decree must appear in the Decree it self; for being of Record must be tried by it.

If the Fact be mistaken at the hearing and decretal Order; that must be rectified by rehearing, and not otherwise.

The Errors assigned by the Bill were, That the Decree was grounded on matters not proved, and instanced in particulars, and that the matters mentioned in the Decree to be proved were not proved, &c. The Demurrer was general, That the Decree contained no Error in Law, and that the matters alledged for Error were but mis judgment. And upon debate it was declared, That upon a Bill of Review the causes for review must arise and appear upon the Case as it is stated in the Fact, and that the Fact must be admitted as it is there stated; and that touching where the Fact is mistaken, upon which the Court grounded their Judgment, it is proper in such case for that reason to have the Cause reheard before the Decree be enrolled: Yet after the Decree enrolled that is no ground for a Bill of Review;

view; for the Decree inrolled is matter of Record, and can be tried by the Record it self after it is inrolled, and must be taken to be true; and so the Demurrer was allowed.

The Original Case of *Comb* and *Proud* was as follows. It was heard at the *Rolls* in *November* last.

The Original Bill was to be relieved against an Account stated between the Mortgagor and the Heir of the Mortgagee, under Hand and Seal, upon Suggestion, That it was agreed upon the sealing, that if there were any mistake in the Account, the same should be reviewed and rectified. The Defendant denyed the Agreement, and pleaded the Account stated, and three Meetings in order to it, and the same perused first by the Plaintiff, and affirmed on his behalf, and then fully consented to and sealed. Issue was taken on the Plea, and the Plea was proved, yet it appearing to the Court by the quantum of the same, that the Account was made up of Interest upon Interest, and the Court taking the Agreement to be proved (howbeit it was not) decreed the Account stated to be set aside, and the Parties to go to account ab origine.

Observe the reason why the Review did not lie, was, because as the Decree was drawn up, there was no Error appeared in it.

The Lord Chancellor.
The Master of the Rolls.

Bolton *against* Arme. June 17.

A Lessee of the Crown made an under Lease of a Rent; during the Usurpation the State voided the first Lessees Estate, and exposed the Crown Interest to sale. The under Lessee applies to his Lessor for Protection; he bids him shift for himself; thereupon the under Lessee pays his Rent to the Purchaser from the Crown for some time, and after the under Lessee purchases his Tenement from him that purchased of the State. Upon the Kings Restauration the first Lessee brings Debt against his under Lessee for the Arreares of Rent from the time he discontinued payment to him, and had Judgment by default, who prayed to

A Judgment for a matter discharged by Act of Oblivion, decreed to be vacated.

to be relieved againſt this Judgment which was by the Bill alledged to be by ſurpꝛize, tho no ſurpꝛize appeared in obtaining the Judgment. Decreed that the Judgment be vacated, foꝛ that the Rent was diſcharged by the Act of Oblivion, of which the Loꝛd Chancelloꝛ ſaid, A Court of Equity was as pꝛoper a Judge oꝛ Interpꝛeter as the Judge at Law.

Court of Equity a proper interpreter of a Statute.

Williams *againſt* Owen *and* Arthur. June 24.

On a Demurrer to an Anſwer.

THE Defendant having anſwered the Bill of Reviver, which ſought to revive the Oꝛder on hearing, as to ſo much as was not within the Decree inrolled, had by his Anſwer ſet foꝛth Matter that tended to dꝛaw into queſtion and new examination an Agreement which was contended within the Decree as it was inrolled, and thereby fully ſetled. Theꝛefoꝛe to ſo much of the Anſwer as tended again to dꝛaw into examination the Matters ſetled by the Decree inrolled, oꝛ by the Oꝛder, on Hearing, the Plaintiff did demur, foꝛ that it would be of evil conſequence, and introductive of Perjury to permit a Re-examination of any of thoſe Matters. Upon debate of this Demurrer, which was dꝛawn by Sergeant Fountain, it was averred by the Defendants Councel, that a Demurrer to an Anſwer was never known befoꝛe in a Court of Equity (tho Sergeant Glyn foꝛ the Plaintiff affirmed he had known of a Demurrer to an Anſwer befoꝛe) And tho it did ſeem unreaſonable to the Court that a Defendant ſhould not by Anſwer dꝛaw again into examination the Matters foꝛmerly examined unto and ſetled, yet the Court doubted what to do as to the Demurrer. Some at the Bar ſaid the Court ſhould have been moved in this Special Caſe foꝛ an Oꝛder to reſtrain an Examination of all Matters foꝛmerly examined and ſetled. And it was now oꝛdered that there ſhould be no Matters re-examined that were examined to befoꝛe. This I take it was the Rule that was given, tamen quære.

Demurrer to an Anſwer.

The

The Lord Chancellor.
Baron Turner.

Nicholſon *againſt* Sherman. June 24.

On a Demurrer.

A. Bequeathes a Legacy, and makes Baron and Feme his Executors, and dies: The Baron afterwards makes his Will, and makes the Feme and his Son Executors, and dies: The Legatee of A. exhibits his Bill againſt the Feme and her Son, ſetting forth the Caſe, ut ſupra, and chargeth that the Eſtate of A. liable to the payment of the Legacy, is come all to the Hands of the Feme and her Son. The Demurrer was by the Son, for that the Feme who was the ſurviving Executor of A. was only liable to his Legacies, and the Son being Executor of one of A.'s Executors that died firſt, leaving an Executor of A. to ſurvive, was not privy in Law nor accountable for the Eſtate of A. which tho it be ſo in point of Law, yet in as much as it was charged that the Son had gotten the Eſtate of A. the Demurrer was over-ruled, the Court declaring that the Eſtate of A. in whoſe ſoever Hands ought to be liable to his Legacies.

The Teſtators Eſtate in whoſe ſoever Hands liable in Equity to his Legacies.

And in Trinity-Term 1665. this Cauſe was heard and decreed.

DE
Term. Sanct. Mich.
Anno Regis 16 Car. II.
IN
CANCELLARIA.

The Lord Chancellor.

Fleming *againſt* Walgrave. October 28.

THE Caſe was thus, 900 l. was ſecured by a Leaſe for years for a Feme Sole, in caſe ſhe did not Marry contrary to the liking of Sir Edward Walgrave and his Lady, and if ſhe did, then to ſuch Perſons as Sir Edward and his Lady, or the Survivor of them ſhould nominate, and for want of ſuch nomination then to Sir Edward Walgrave and his Lady, and the Survivor of them; and in this caſe Sir Edward Walgrave and his Lady were Leſſees in Truſt. The Feme Sole married without their conſent; Sir Edward dies without any appointment, and ſo did his Lady, who ſurvived him, and had after the death of Sir Edward made a general Deed of Gift of all her Goods and Chattels to one Sandal. The Queſtion was between Sandal and Francis Copledike, who was Adminiſtrator to the Lady, and alſo to the Feme Sole, who ſhould have the Benefit of this Leaſe? The Court was of Opinion, That it was not in the power of Sir Edward and his Lady to have diſpoſed of this Leaſe otherwiſe than for the benefit of the Feme Sole, if ſhe had lived, and that Francis Copledike as Adminiſtrator to her, and alſo to the Lady, was well entituled to the benefit of the Leaſe, and ſo decreed it.

A Truſt for raiſing Mony for a Feme Sole if ſhe marry with conſent of the Truſtees, and if not, ſuch as the Truſtees ſhall name, or elſe to themſelves, ſhall enure to the Adminiſtrator of the Feme Sole.

The

The Lord Chancellor.
Lord Chief Justice Bridgman.

Dickenson *against* Knowel. November 3.

THE Plaintiffs were bound to one Crofts (to whom the Defendant was Executor) in 600 l. for the payment of 300 l. Crofts was sequestred by the Usurper, and for 300 l. which the States owed the Plaintiffs, they had an Order from the Committee to retain the 300 l. of Crofts for satisfaction. The Bond was upon the Kings Restauration put in suit, to be relieved against which, was the scope of the Bill. The Question was, Whether the Defendant was barred by the Act of Oblivion?

An Act of Indemnity makes good only actual Payments.

Bridgman being present, he declared, he conceived that the Defendant inasmuch as Crofts still kept the Bond, and the Mony was not actually paid, but retained, was not discharged by the Act of Indemnity. But it was referred to make a Case.

At the Rolls.

Rand *against* Cartwright. November 3.

A Man makes a voluntary Deed, and then a Mortgage of the same Lands. The first Deed upon Trial at Law is found fraudulent; he to whom the Deed is made exhibits a Bill to redeem the Mortgage.

A voluntary Conveyance precedent, void *quoad* a Mortgage subsequent, prevailed so as to pass the Equity of Redemption.

It was held, that tho the first Deed was fraudulent, because voluntary quoad the Mortgage Mony & pro tanto, yet that it was good as to the Equity of Redemption, and would pass that; for that a voluntary Deed will not bind the Party that makes it, and his Heirs. But the Matter was compromised.

Juſtice Archer.

Renneſey *againſt* Parrot. December 15.

On a Demurrer.

Legacies payable at 21, and no maintenance in the mean time.

THE Plaintiffs were Legatees, their Legacies to be paid at twenty one years of Age. They ſuggeſt they had no maintenance, and by their Bill a Guardian prays, that the Defendant, who is the Executor of the Will, may allow them Maintenance.

Qu. what Equity may do in this caſe.

The Defendant demurred; for that the Plaintiffs were under Age, and their Legacies were not to be paid till 21, and ſo had no cauſe of Suit.

Collins for the Defendant, and none for the Plaintiff; the Demurrer over-ruled.

The Lord Chancellor.

Criſpe *againſt* Nevil. December 16.

When the firſt Anſwer is reported inſufficient, the Defendant if he anſwer again without excepting, is to anſwer all the Points excepted, tho the ſame exceed the Bill.

THE Plaintiff excepts to the Anſwer. The Exceptions are referred. The Maſter certifies the Anſwer inſufficient in the Points excepted to. Then the Defendants fully anſwers to the Charge of the Bill. But in truth the Exceptions were longer than the Bill. The Maſter upon a Reference to the ſecond Anſwer, reports the Anſwer inſufficient in the Points excepted unto. The Defendants except unto the Report, and upon debate the Defendants Councel inſiſted they had anſwered well to the Bill, and that they ought not to be put to anſwer any Matter but what is in the Bill. But the Plaintiffs Councel inſiſted, That inaſmuch as the Defendants did not except againſt the firſt Report, but had ſince anſwered, they had admitted they ought to anſwer to all the Matters of the Exception; and ſo it was ruled.

DE

DE
Term. Sanct. Hill.
Anno Regis 16 & 17 Car. II.
IN
CANCELLARIA.

The Maſter of the Rolls.

Cocker *Knight and the Lady* Elizabeth *his Wife, Son and Heir of* Edmund Ludlow, *Son and Heir of* Henry Ludlow, *againſt* Bevis. Jan. 23.

UPON hearing and debating the Matter in queſtion between the ſaid Parties this preſent day in preſence of Counſel learned on both ſides, the ſubſtance of the Plaintiffs Bill appeared to be, that Henry Ludlow having borrowed the Sum of 2000 l. of Peter Bevis, the Defendants Father, did for Security of 1000 l. thereof by Indenture dated the 21th of September, Anno 5 Car. 1. demiſe unto the ſaid Peter Bevis, the Manor of Kingſton Deveril with its Appurtenances, for the Term of 99 years, and for Security of the other Sum did by Indenture the 7th of the ſame Month in the year aforeſaid demiſe ſeveral Woods called Sawley, Eulel and Ely, and divers Grounds, unto the ſaid Peter Bevis for the Term of 99 years aforeſaid. And that the ſaid Peter Bevis by Indenture 29 Octob. 5 Car. 1. did redemiſe the ſaid Manor of Kingſton Deveril with the Appurtenance unto the ſaid Henry Ludlow

Ludlow for the Term of 99 years, rendring a yearly Rent unto the said Peter Bevis of 100 l. at Lady-day and Michaelmas, by equal portions, during the life of Susan, the Wife of the said Peter Bevis, and Richard Cubbel, and the longest liver of them; and by another Indenture dated 9 Octob. in the same Year, did demise the said Woods and Grounds unto the said Henry Ludlow for the same Term, rendring unto the said Bevis 100 l. per annum, during the life of Richard Bevis, William Bevis and Sebastian Isaac, which said Lands at the time of the aforementioned Grants were worth to be sold 8000 l. and that for six years and an half the said Henry Ludlow did duely pay the said Rent, amounting to 1300 l. and that for Nonpayment thereof about the year 1640. the said Bevis made his Entry, and received the Profits thereof, whereupon John Ridout Gent. and Elizabeth his Wife, formerly the Wife and Executrix of Edmund Ludlow, together with the now Plaintiffs, about Easter Term, 1650. exhibited their Bill into this Court to have a Redemption of the said Mortgage, paying what should appear due on the said Account.

Upon hearing of which Cause in Novemb. following it was ordered and decreed by the consent and agreement of the Parties, that the then Plaintiffs should pay all the Arrerages of the said Rents at 160 l. per ann. and that upon payment thereof the said Bevis should reconvey the said mortgaged Premisses unto the then Plaintiffs, or to whom they should appoint; and to that end did appoint an Account to be taken by Mr. Rich, then one of the Masters of this Court, and what he should find due was to be paid, 100 l. thereof at Christmas then following, and the residue at the end of six Months and six Months then next following, by equal portions: Pursuant to which Order the said Master certified there was due to the said Bevis the Sum of 4640 l. which Sum was made up of Interest during the late Troubles at 8 l. 10 s. per Cent. which said 100 l. was duely paid at the time prefixed for that purpose. But the Plaintiff being a Colonel in the Kings Army, and about the time allowed for the latter payments being engaged in his Majesty's Service at Worcester, was forced to leave the Kingdom, and thereby disabled to make satisfaction according to the Decree. Nevertheless did write to the said Bevis to sell part of the said Lands and pay himself what was due to him, who accordingly sold unto Sir James Thynn and others so much of the said Premisses as raised the whole

Mony,

Mony, and yet continued the Poſſeſſion and received the whole Profits of the reſidue of the Lands, and about four years ſince dyed, whereby the ſaid Premiſſes came unto the Defendant his Son, as Adminiſtrator of the ſaid Peter Bevis his Father, who continues the Poſſeſſion thereof; Therefore that the ſaid Defendant might come to an Account with the Plaintiff for the meſne Profits by him received, and that he may reconvey the mortgaged Premiſſes to the Plaintiff, or to whom he ſhall appoint, he being willing to ſatisfie the Plaintiff if any thing ſhall be found due to him on account, is the ſcope of the Bill.

Whereunto the Counſel for the Defendant inſiſted, that there was ſuch a Decrée as in the Bill ſet forth, and that for the Nonpayment of the mony computed due, which conſiſted only of the Arrears of Rent, without any Intereſt for the ſame, the ſaid Decrée became abſolute: Upon which the ſaid Defendant reſted ſatisfied, and the Sale made to Sir James Thynn was not purſuant to ſuch Letter ſent by the Plaintiff, but ſold on the ſaid Peter Bevis's own account, and wherein the ſaid Peter Bevis hath given a general Warranty, wherein he hath bound himſelf and his Heirs in perpetuity; which he would not have done for a third perſons advantage.

This Court nevertheleſs after long debate of the Matter, and hearing what could be alledged by Counſel on either ſide, and reading of the whole Proofs taken in this Cauſe, and of the Decrée made in the former Cauſe, which appeared to be made by conſent, was fully ſatisfied that the Decrée was in the nature of a Mortgage, and but a Security for Mony, although the ſame was made abſolute, and the ſaid Leaſe to Mr. Bevis confirmed: And inaſmuch as the Conſent and Agréement of the ſaid Parties was in part executed by the payment of the ſaid 200 l. and the Conditions of the Times being then ſuch, that as appeared by the Defendants own proofs, that part of the Lands could not be ſold, by which the Plaintiffs could not make ſatisfaction of the ſaid Decrée, notwithſtanding a continued endeavour appeared in the Plaintiffs to that purpoſe, as his deſire of Sale of part of the ſaid Premiſſes to Sir James Thynn, and Sale made by the ſaid Mr. Bevis, and much Monies received by him by Fines and otherwiſe, of ſome of the Tenants of the ſaid Manor: And it alſo appearing that this Court hath very often in ſuch like Caſes of inevitable neceſſity, and no wilful default appearing in the Party,

Decree in nature of a Mortgage.

Where a Decree to foreclose the Mony not paid, the Court in Cases of inevitable necessity will inlarge the time, though the Decree be signed and inrolled.

The Decree avoided by original Bill upon matter subsequent to the Decree.

Party, inlarged the time as to the performance of the Decrée notwithstanding such Decrees have been signed and inrolled, and this appearing to be new matter subsequent to the said Decrée, was also satisfied the Plaintiffs are capable of relief in this Court, and do therefore think fit, and so order and decrée, that both Parties do proceed to an account; and that it be taken by Sir Thomas Bird Knight, one of the, &c. and the Plaintiff is at liberty to take out a Commission in the Country for proof of any thing relating to the said Account; upon which Account the Master is to allow unto the Defendant the whole Mony decréd, with damages for the same since the time the same should have been paid by the Decrée, deducting the 200 l. already paid as aforesaid; and that the said Defendant Mr. Bevis do also account before the said Master for what he really made and received of the said Manor of Kingston Deveril, by granting Estates or otherwise; as also the Profits made by the Woods called Sawley, &c. by the Defendant and his Father, before Sale thereof unto Sir James Thynn; and also in making and confirming the Tenants Estates in the said Premisses which said Estates together with the aforesaid Sale to the said Sir James Thynn, the Plaintiff is hereby decréd to confirm and to discharge the Defendant, his Heirs, &c. of all Covenants entred into thereupon, &c. And the said Master is to appoint a time and place for payment of what shall appear due; Upon payment whereof, it is decréd, the Defendant shall reconvey the said morgaged Premisses, unsold as aforesaid, to the Plaintiffs, or whom they shall appoint, fréed of all incumbrances done by him and his Father, or any claiming by, from or under the said Peter Bevis the Defendants said Father.

The 18th of February, 17 Car. 2. upon Re-hearing the said Cause the said Order was confirmed.

The Lord Chancellor.

Wollet *against* Roberts. January 27.

AT the hearing the now Plaintiffs offered a Bill exhibited formerly by the Defendant against the now Plaintiffs in Evidence, to which it was agréed, the now Plaintiffs had answered. The now Defendants objected, that

that the Bill ought not to be read for Evidence againſt them, unleſs the Plaintiffs could prove it was exhibited by the now Defendants direction or privity; for any perſon may file a Bill in another perſons name. And the Court were of Opinion, that it ſhould not be read unleſs it were proved to have bin exhibited with the privity of the Party Plaintiff in it. But the Defendants Counſel did after admit it to be read.

A Bill in another Cauſe, no Evidence againſt the Plaintiff in it, unleſs it be proved to be exhibited with his Privity.

Juſtice Tirrel.

Sewel *againſt* Freeſton.

On a Plea and Demurrer.

THE Bill was after Verdict in an Action on the Caſe.

The Equity was, that the Defendant had writ a Letter, which the Plaintiffs could not prove at the Tryal, which would have diſcharged the Plaintiff, and ſo ſets forth the ſubſtance of it, and that the matter lay only in the Defendants Cognizance, and ought to be anſwered, and that the Plaintiffs Witneſſes were beyond the Seas.

The Plea was to the Verdict, and that the effect of the Letter was given in Evidence at the Tryal, and Demurrer was for want of Equity.

On debate it was inſiſted, that there was not any Preſident of a Bill in like Caſe after Verdict; but before Verdict might be proper for diſcovery. Payton and Humfryes Caſe was cited for the Plaintiff; but anſwered that was for matter diſcovered after the Tryal, but no ſuch matter pretended here: And as to the allegation of the Plaintiffs Witneſſes being beyond Seas, if the Plaintiff could not have them at the Tryal; It was anſwered, that upon an Affidavit of that at Law the Court there would have ſtayed the Tryal. And the Caſe was referred to Preſidents; and after the Plea and Demurrer allowed.

A Bill after a Verdict in Caſe, on Suggeſtion of matter in Defendants Cognizance, which the Plaintiff could not prove at the Tryal.

DE
Termino Paſchæ
Anno Regis 17 Car. II.
IN
CANCELLARIA.

Gower *againſt* Baltinglaſs. May 26.

THE Bill was to diſcover a Writing, which is ſuppoſed the Defendant the Lady Baltinglaſs had concealed, ſhe having gotten a Trunk of Writings by a trick from a Maſter of the Court. The Defendant had put in four inſufficient Anſwers, and delayed the Plaintiff eight years; and upon the fourth inſufficient Anſwer was ordered to be examined upon Interrogatories. And now upon motion ordered, that one of her Counſel ſhould attend in the next room when ſhe was examined, to adviſe her in any matters of Law if ſhe ſhould need it. And afterwards on an other day ordered on debate that her Counſel ſhould ſee the Interrogatories, but not have a Copy.

Counſel ordered to have a ſight of the Interrogatories, to which the Defendant was to be examined.

Love

Love *and others against* Baker, Roll *and* Clutterbuck. May 28.

THE Defendants brought a joynt Action at Leghorn against the Plaintiffs, and had there arrested the Plaintiffs Goods. The Defendant Baker being here and the other Defendants at Leghorn, Baker answerd here, and by Order a Supœna left with him was to be good service for the other Defendants, and thereupon an Attachment for want of an Answer; and upon this an Injunction was granted to stay the Defendants Proceedings at Leghorn. Now the Defendants moved to dissolve the Injunction, and insisted it was a new Case.

A *Subpœna* served on a Defendant here, ordered to be good service for the other Defendants beyond the Seas.

The Lord Chancellor conceived it to be a dangerous Case to stay their Suit there, and so deprive them of their remedy. To which it was answered, all Parties might have Justice and be fully heard in this Court. But the Plaintiffs would be without remedy if the Defendants proceeded at Leghorn and got Possession of their Goods. And the Court declared they would advise with the Judges herein; and afterwards the Lord Chancellor declared, he had advised with the Judges, and that they were of Opinion the Injunction ought to be dissolved. Sed Quære, for all the Bar was of another Opinion. It was said the Injunction did not lie for foreign Jurisdictions, nor out of the Kings Dominions. But to that it was answered the Injunction was not to the Court, but to the Party.

The Lord Chancellor.

Smith *against* Pemberton. May 30.

THE Mortgagee had assigned the Mortgage. The Mortgagor comes to redeem. The Question was, If what was really due to the Mortgagee when he assigned for Principal and Interest, and paid him by the Assignee, should be taken as Principal, or so much only as the Mortgagee first lent.

All Mony really due and paid by the Assignee to the Mortgagee, to be taken as Principal against the Mortgagor from the time of the Assignment.

Ordered that all Monies really paid by the Assignée, that was due to the Mortgagee, should be Principal to the Assignée. But the Account betwæn the Mortgagé and Assignée was not to conclude the Mortgagor, but the Master to see what was really due at the Assignment, and whether he had really paid the Mony: For if the Assignment was colourable it would be otherwise.

The Lord Chancellor.
Chief Justice Bridgman.
Baron Turner.
The Master of the Rolls.

Lord Digby *against* Langworth. May 30.

Trust. Whether a Recovery by Tenant in Tail, with Remainder in Tail to another shall bar the Remainder.

Whether Tenant in Tail of a Trust, Remainder in Tail to another; if the Tenant in Tail by suffering a Recovery, that Recovery shall bar the Remainder which is no settled Interest vested.

Bridgman was of Opinion it should not. But it was referred to a Case, and the Judges to consider of it. See the Case of Goodrick and Brown before, fol. 49.

The Lord Chancellor.
Chief Justice Bridgman.
Judge Archer.

Sherly *Esquire against* Fagg. June 1.

On a Plea.

THE Plaintiff by his Bill made Title to the Lands in Question by an Intail of his Great Grandfather 9 Jac. whereby the Premisses were limited to the Great Grandfather for Life, Remainder to the Plaintiffs Grandfather by Name for Life, Remainder to the Plaintiffs Father by Name for Life, Remainder to the first Son (which the Plaintiff is) and other Sons in Tail, and shews how by

by virtue of thoſe Limitations, the Great Grandfather, Grandfather and Father did enjoy during their reſpective Lives, and the Plaintiffs Father died about ten years ſince, the Plaintiff then an Infant of ten years old, and that the Plaintiff ought to enjoy by that Settlement. And the Bill complained that Sir John Fagg and the reſt of the Defendants had entred into ſeveral parts of the Premiſſes, and did divide the ſame among them, having gotten the Evidences and the Settlement, and did conceal the ſame, which the ſaid Sir John had gotten into his hands from one Walter for a Reward to him, or otherwiſe, and he had altered and confounded the Bounds and Names of the Land, and ſo to have a diſcovery of Evidences, and the Deed of Settlement and delivery up of the ſame was the ſcope of the Bill.

A Purſacher from *A.* of Lands which *B.* makes Title to, getting the Deeds making out *B*'s Title, is not bound to diſcover them.

The Defendant Fagg pleaded, that for 6870 l. really paid to the Earl of Thannet, he purchaſed the Premiſſes of him by good Conveyance at Law; And demands Judgment whether he ſhall further diſcover his Title or any Deeds or Evidences to weaken it. And upon long debate after a Caſe ſtated, the whole Court was Opinion that the Plea was good.

DE

DE
Term. Sanct. Hill.

Anno Regis 17 & 18 Car. II.
IN
CANCELLARIA.

The Lord Chancllor.

Baker *againſt* Shelbury. 10 February.

The Maſter ordered within a ſhort time to ſue his Apprentices Indentures, or elſe to deliver them up.

THE Bill being to be relieved againſt an Apprentice, Bond and Articles, and to have them up; Upon hearing ordered that the Defendant do within a certain time (viz.) one year, bring his Action, and go to Trial thereupon for his Damages, or in default thereof the Bond and Articles to be delivered up. And the reaſon that was given, was, That if it were at the Defendants choice to ſtay his Action as long as he pleaſed, he would ſtay till the Plaintiffs Witneſſes were dead. And it was ſaid it was uſual in the Caſe after Apprentices were out of their Time, to exhibite a Bill to put their Maſter to ſue their Covenants within a certain time, or elſe to deliver up their Indentures.

The

The Lord Chancellor.

Digardine *againſt* Swift. February 22.

UPON a motion it was ordered, that where one of the Bail at Law for the Plaintiff had proſecuted a Suit in Equity in the Plaintiffs Name in his abſence, the Plaintiff not being to be found, and the ſaid Perſon his Bail acting throughout the Cauſe in this Court as Party and Sollicitor, that the Sollicitor ſhould pay the Defendant here his Coſts. But this was in reſpect he was Sollicitor and Proſecutor, and not as Bail; for there being other Perſons that were Bail, the Court declared they would not charge them with the Coſts. And the Maſter of the Rolls to whom this matter was formerly moved, as concerning the Sollicitors paying the Coſts, deſired to ſee Preſidents before he made any Order. And declared in this Caſe, that if there were any one Preſident, he would make the ſecond.

The Sollicitor to pay the Coſts where the Party abſents himſelf.

The Lord Chancellor.
Juſtice Windham.
Baron Turner.

Drake *againſt the Mayor of* Exon. February.

A Leſſor and Leſſee for years, the Leſſor covenants with the Leſſee and his Aſſigns to renew, then the Leſſee becomes Bankrupt, and Commiſſioners of Bankrupt aſſign this Covenant. The Aſſignee brought his Bill to have the Defendant, the Leſſor, to renew the Leaſe to him. The Caſe was referred to Juſtice Windham and Baron Turner, and they certified the Plaintiff ought not to be relieved; and ſo he was diſmiſt.

Commiſſioners of Bankrupt cannot aſſign a Covenant in a Leaſe to renew.

Sergeant Nudigate, who was Councel in this caſe for the Defendant, ſaid, it had been ruled in this Court, that Commiſſioners of Bankrupt might aſſign an Equity of Redemption of a Mortgage. But quære, For it ſeems to be

Qu. whether they can aſſign an Equity of Redemption.

be againſt the Statute, which enables them to the benefit of a Condition that is perfoꝛmed, and not foꝛfeited.

The Lord Chancellor.
Juſtice Windham.

Lawrence *againſt* Braſier.

Mony payable by Condition of a Bond, moderated in reſpect of the Office out of which it was to iſſue, taken away

A Bond was entred into befoꝛe the Wars, conditioned to pay 40 l. per annum foꝛ twelve years out of the Profits of an Office, which Office was taken away by the Uſurpers. And the Obligoꝛ being ſued on the Bond, and the Office reviued, he exhibited his Bill to be relieved againſt the Bond. The Obligee inſiſted that the Office continued ſome part of the twelve years, and being now reviued, the Obligoꝛ ought to pay the 40 l. per annum foꝛ twelve years, oꝛ be diſmiſt; foꝛ the Obligee having the Law with him ought not to be hurt in Equity without ſatisfaction accoꝛding to the Condition.

It was decreed, that the Obligoꝛ ſhould pay the 40 l. per annum foꝛ ſo many years as the Office continued, and thereupon the Bond to be delivered up.

DE

DE
Termino Paſchæ
Anno Regis 18 Car. II.
IN
CANCELLARIA.

The **Lord Chancellor.**
Baron **Turner.**

Terwit *againſt* Greſham. March.

Depoſitions in a former Cauſe between other Parties, read againſt one that claims not under any of thoſe Parties.

ORdered upon long debate, that Depoſitions of Witneſſes taken in a former Cauſe thirty years ſince, where the ſame Matters were under examination, and in iſſue as in this (the Point being concerning Incumbrances and Dampnification in both Caſes) ſhould be made uſe of in this Cauſe, albeit the Plaintiff in this Cauſe, and thoſe under whom he claims, were not any Parties in the former Cauſe, inaſmuch as the Ter-tenants were then Parties, and the now Plaintiffs, Title did not then appear, and the Witneſſes were dead; and Preſidents were cited for this between Trinity-Hall and Doctors-Commons, where Dr. Norths Depoſition taken in a former ancient Cauſe, where neither of the now Parties were Party, was read. And the like between Culton and Vaugham.

The Lord Chancellor.

Armitage *againſt* Metcalf. May 16.

Where the Heir being forced to pay the Debt of his Anceſtor, ſhall recover againſt the Executor.

THE Cauſe being heard about 1664. and one Point being, That the Obligor having paid a Debt of his Anceſtors upon Bond, might be reimburſed the Mony by the Executor of the Obligor, who had perſonal Aſſets, the Heir being forced to pay the Debt by a Suit, it was decreed the Executor ſhould reimburſe the Heir as far as there were perſonal Aſſets come to the Executors Hands. And upon Exception taken to a Report in this Cauſe, which came to be heard before Mr. Baron Atkins 29 Junii 1668. there was this Point, Whereas A. alone was bound to the Teſtator, the Executor delivered up the Bond and took another to himſelf for the ſame Debt, whereby as was alledged by the Counſel of the Executor, the Security was bettered; And whether this in Equity ſhould be charged as Aſſets in the Executors Hands, he having delivered up the old Bond, was the queſtion.

Where the delivering up of a Bond by the Executor, and taking a new Bond to himſelf for the Debt, is no converſion in Equity to charge the Executor with the payment of that Mony.

Againſt the Executor it was inſiſted, that the taking the new Bond had altered the Property of the Debt, ſo that if the Executor died Inteſtate, his Adminiſtrator would have the Debt; whereas if it had reſted on the old Bond, the Adminiſtrator de bonis non of the firſt Teſtator ſhould have it ſubject to the firſt Teſtators Debts. It was admitted that at Law this did charge the Executor as a Converſion and Receipt of ſo much of the Eſtate. But it was inſiſted, that in Equity he having taken the ſame Perſon, and another bound, and offering to aſſign the Bond to the Heir, it ought not to charge him, eſpecially when the Heir is Plaintiff in Equity, as here. And it was ruled, that the Executor ſhould not be charged with the Mony by altering the Security, but that he ſhould aſſign the Security to the Heir.

The

The Lord Chancellor.
The Maſter of the Rolls.

Smallpiece *againſt* Anguiſh. May 25.

THE Bill ſuggeſted, that the Defendant did endeavour to ſet up a Will, pretended to be made by one that died in the great Sickneſs in London, and that the Defendant was Executor of it, whereas there was no ſuch real Will, but obtained unduly; and that was conteſted in the Spiritual Court. And yet the Defendant in the interim being inſolvent, endeavoured to get in the Debts due to the Eſtate. The Defendant demurred, for that the Bill contained no Equity, and the ſuggeſtion of inſolvency might be made againſt every Executor. But the Demurrer was over-ruled; and upon motion, it was ordered that the Debtors to the deceaſeds Eſtate ſhould forbear to pay any Mony till the matter ſettled in the Spiritual Court. And note, That upon examination this was found to be a forged Will, and the Defendant ſtood in the Pillory for it.

Injunction to Debtors to a Teſtators Eſtate not to pay any Mony to a pretended Executor till his Title to the Executorſhip were ſetled in the Spiritual Court.

DE
Term. Sanct. Mich.
Anno Regis 18 Car. II.
IN
CANCELLARIA.

In Court. *Master of the* Rolls.

Knipe *againſt* Jeſſon. November 13.

The Factor (not the Imployer) to have the benefit of ſtollen Cuſtoms.

THE Defendant imployed the Plaintiff as his Factor beyond Sea, and brought an Action of Account againſt the Plaintiff here at Law, and had Judgment quod computet. The Plaintiff brought his Bill here to have an allowance upon account, for what he had ſaved in not paying the Cuſtoms for thoſe Goods (which could not be allowed before the Auditor as was ſaid) and an Allowance was decreed to the Plaintiff for the ſame againſt the Defendant the Imployer; and ſo it was referred to a Maſter to take the Account. Vide Smith and Oxenden f. 25. and Bore and Vandvale f. 30.

Hampden

Hampden *againſt* Brewer. November 19.

On a Demurrer.

Richard Hampden made the Plaintiff and his Widow Executors, under this Condition, That if the Widow married, her Executorſhip to ceaſe, and the Plaintiff to be ſole Executor. The Plaintiff and the Widow exhibited the Bill, to which the Defendant anſwered, and ſeveral Orders were made, one (inter alia) by conſent to refer Matters finally to be determined: Then the Widow married, and it became a queſtion in this Caſe, Whether the Plaintiff might proceed upon that Bill (wherein there was no mention that the Widows Executorſhip was Conditional, but the Bill was by both as Executors General) or whether he muſt bring a Bill of Reviver; And upon a Reference of that Point to Chief Juſtice Bridgman, he was of Opinion he muſt bring a Bill of Reviver; though Sergeant Fountain upon producing the Will under Seal, whereby it appeared the Widows Executorſhip was conditional, ut ſupra, did inſiſt, that there was no need of Reviver. This was the Reſult of the former Debates.

Two Executors (the one conditional) are Parties, the Condition is broken, the other Executor muſt revive.

A Bill of Reviver was brought which was to revive all the former Proceedings, and particularly the Order by conſent. The Defendant did demur to the Bill, for that it ſought to revive that Order, whereas the Feme was a Party to it, and ſhe being married ſince her Executorſhip, conſequently her conſent was determined. And upon debate (which was the only work of this day) the Demurrer was allowed.

Demurrer, becauſe more was prayed to be revived then can be.

In Court. The Maſter of the Rolls.

Underwood *againſt* Staney. November 24.

THE Obligee in a Bond of 20 years old exhibits his Bill againſt the Adminiſtrator of the Principal and the Surety (upon loſs of his Bond,) The Adminiſtrator ſaith by his Anſwer, that he hath no Aſſets. Upon hearing the Cauſe it was directed to a Trial, whether the Surety had

Obligee in a Bond loſt, hath remedy againſt the Surety in Equity.

had ſealed and delivered the Bond; and a Verdict had paſſed againſt the Surety, (viz) That he had ſealed and entred into the Bond. And the Cauſe coming back to this Court, and the Plaintiffs Councel praying a Decree for the Plaintiffs Debt againſt the Surety, Sergeant Fountain (not of Councel on either ſide) ſaid it was doubtful whether Equity ſhould in this Caſe bind the Surety who was not obliged in Law, but in reſpect of the lien of the Bond, and that being loſt, and the Surety having no benefit by (nor conſideration for) being bound, he thought Equity after ſo long a time ſhould not charge the Surety. The Maſter of the Rolls ſaid he would ſee to moderate and mediate this Matter between the Parties, in order to which he was ſeveral times attended for the Plaintiff, and the Defendant making default he decreed for the Plaintiff. And afterwards the Cauſe was upon a Caſe brought before my Lord Chancellor, who was of Opinion with the Maſter of the Rolls, and decreed it for the Plaintiff.

Obligee in a voluntary Bond loſt, hath remedy in Equity.

It was in the debate of this Caſe ſaid, That if a Grantee in a voluntary Deed, or an Obligee in a voluntary Bond loſe the Deed or Bond, they ſhould have remedy againſt the Grantor or Obligor in Equity. Tamen qu. But if ſo, no miſtake in the Principal Caſe, where the Bond was for Mony lent; and tho the Surety had no advantage, yet the Obligee had parted with his Mony, and Loſs is as good a conſideration for a Promiſe, as Benefit or Profit.

Loſs as good a conſideration of a Promiſe as Profit.

DE

DE
Term. Sanct. Hill.
Anno Regis 18 & 19 Car. II.
IN
CANCELLARIA.

In Court. The Master of the Rolls.

Dr. Thorndike *againſt* Allington. January 26.

A Deviſe was to the Plaintiff by the Defendants Father (whoſe Son and Heir the Defendant was) of 20 l. per Annum out of a Rectory, with a Clauſe of Diſtreſs for non-payment.

The Glebe belonging to the Rectory was but of 40 s. per annum, and the Tithe not being ſubject at Law to a Diſtreſs, and ſo no ſufficient remedy at Law for the Rent, thereupon the Plaintiff brought his Bill to have the whole Rectory liable to the Rent, and the Defendant decreed to pay it. On the Defendants part it was inſiſted, that this Court ought not to extend a Remedy beyond what the Deviſor appointed, and the Plaintiff muſt take ſuch remedy as by Law he might. To which the Plaintiffs Councel replied, That the Deviſor gave the Annuity out of the whole Rectory, and intended the Tithe as well as the Glebe ſhould be liable to it. And that in Caſe of a Rent-ſeck where the Grantee had no Seiſin, this Court had frequently given Relief by Decree here. But the Defendants Councel inſiſted, that that was not like this Caſe, becauſe in that Caſe there was no remedy at Law at all.

Remedy in Equity for a Rent, where the Remedy at Law is not ſufficient.

Rent-ſeck without Seiſin recoverable in Equity.

The

The Perſon made liable to the Arrears of Rent, with which he was not chargeable at Law.

The Court decreed that the whole Rectory be liable to pay the Annuity, and that the Defendant do pay the Arrears and Coſts.

The Maſter of the Rolls.

Beverſham *againſt* Springold. February 11.

A Perpetual Injunction awarded againſt the Defendant not to prove a Will touching a Perſonal Eſtate only in the Prerogative Court.

Injunction not to prove a Will in the Spiritual Court.

But Note, That in this Caſe it was directed by this Court to be tried at Law, Whether a Will or no; and found againſt the Will; and then this Injunction was awarded.

The Lord Chancellor.

Gilpen *againſt* Smith *Knight, and Dame Dorothy his Wife and* Zouch.

UPON a Rehearing before the Lord Chancellor. Sir Edward Zouch ſeiſed in Fee of Lands, ſetled them on Truſtees after his death for payment of his Debts, and dies, leaving the Defendant Zouch his Son and Heir, an Infant, and the Defendant Dame Dorothy his Widow; ſhe entreth upon the Lands, and taketh the Profits (the Truſtees not at all acting) then ſhe marries Lloyd. After the Marriage he continues to take Profits during his life, as ſhe had before. He dies, then the Defendant Sir ····· Smith intermarries with Dame Dorothy, and ſhe being in receipt of the Profits till that time, the Defendant Smith continued to receive the Rents until the Defendant Zouch came of Age. The Plaintiff was a Creditor of Sir Edward Zouch, and his Bill was againſt the Heir of Sir Smith and his Wife, and the Truſtees to have his Debt paid.

This

This Cauſe being firſt heard at the Rolls, It was there decreed, that the Plaintiffs Debt ſhould be paid, and that both the Lands and Smith (in reſpect of the Profits taken by Dame Dorothy and Lloyd and Himſelf) ſhould be liable to the payment thereof, with this, that if it fell on the Heir to pay the Debt, he ſhould have the benefit of the Decree to reimburſe him againſt Sir Smith ſo far as the Profits taken by Dame Dorothy, Lloyd and Smith did extend.

From this Decree Sir ····· Smith and his Wife appealed. And for Sir ····· Smith it was inſiſted, that he ought not to be charged with the Profits taken by the Lady, or Lloyd her former Husband; and farther, that ſhe had Aſſets of Lloyds Eſtate, to whom ſhe was Executrix.

Whether the ſecond Husband be anſwerable for Profits of Land wrongfully taken by the Wife *dum ſola*, and after by her former Husband during their Coverture.

The Argument on Sir ····· Smiths part was thus; Either the Profits taken by the Lady and Lloyd were taken by Right (for there was a pretence ſhe entred on the Lands as part of her Joynture) or by Wrong; If by Wrong, then Lloyd the Wrong-doer being dead, the Tort was dead with him, and ſo there was no Remedy to be anſwered for that Wrong; and compared this Caſe to a Treſpaſſer, and the Treſpaſſer dead. If by Right, then not anſwerable over for them.

Sergeant Maynard for the Heir inſiſted, that both by Law and Equity Sir ····· Smith and the Lady were anſwerable for the Profits taken by the Lady, and after by Lloyd; As if Feme Tenant pur vie marry, and the Husband doth waſt and dies, Waſt lies againſt the Wife. And compared it to the Caſe where a Feme Executrix takes a Husband that waſts the Teſtators Eſtate, a Devaſtavit lies againſt the Feme after the Husbands death for the waſt of the Husband. And the Feme by her entring and meddling had made her ſelf liable to anſwer what ſhe had took as a Debt; and Lloyd her Husband upon his Marriage continuing to take the Profits as ſhe did, its a continuance of the Wrong ſhe did, and by colour of her having entred before and taking the Profits, made her liable for her own Receipts, as a Debt owing by her. And her Marriage

with, Lloyd which is her own Act, cannot discharge herself; and the Husband must be looked upon as acting in this Case, by reason of the Wifes so acting before. And so upon the whole Matter the Court conceived the Decree just, and that Sir ····· Smith must take his Wife chargeable with this Debt. But for the proof, that the Mother and the Son were related to the Earl of Angleſey, it was referred to him to moderate the matter if he could; if not, then directed a Case to be made.

DE

DE

Termino Paſchæ

Anno Regis 19 Car. II.

IN

CANCELLARIA.

The Lord Chancellor.
The Maſter of the Rolls.

Sir John Harriſon *againſt the Lord* North, *Executor of the Lady* Mountague. April 25.

THE Plaintiff was Tenant to the Lady Mountague of a Houſe in London, at a certain Rent: He left the Houſe and went to Oxon to the late King, and then ſent his Servant with the Key of the Houſe to the Lady, and deſired her to re-enter and accept the Surrender. She ſaid ſhe would adviſe with the Defendant her Son-in-Law, (who then ſate in the Houſe of Commons and acted with them.) Afterwards ſhe refuſed to accept of a Surrender. The Houſe was made an Hoſpital by the Parliament for maimed Souldiers. The Defendant as Executor to the Lady brought Debt at Law againſt the Plaintiff for Rent incurred whilſt the Houſe was ſo uſed, and all the time. To be relieved againſt which Action was the ſcope of the Bill.

Finch pro Quer. It is but reaſonable that if a Tenant be put out by ſuch againſt whom he can have his Remedy over, that he notwithſtanding be liable to pay his Rent to the Leſſor. But here the Plaintiff hath no remedy over; and it was an Act of force in the Parliament which is pardoned by the Act of Oblivion, and ſo no Remedy over, and the King hath pardoned all his Arrears of Rent. The Law of England is ex vi termini, ſtricter in the Matter of Rents than other Nations, for redditus & reddere is accepted as reſtituere, and render implies apprendre.

Whether Tenants held out by force by Souldiers in time of Rebellion ſhall for the time be relieved in Equity againſt payment of his Rent. *Æquitas ſequitur Legem.* *Carter* and *Commins* Caſe.

Maynard for the Defendant. The Plaintiff hath a pitiful Caſe, but not ſuch as this Court can relieve; for the Law and Equity is all one in this Caſe; and if the Matter be no good Bar at Law, it is not good in Equity. And he inſiſted, that if Rebels the Kings own Subjects do an Act of Force, and hold a Tenant out, that is no Equity to excuſe him from payment of his Rent, and cited the Caſe of Carter and Cummins about two years ſince in this Court, where the Plaintiff being a Tenant of a Wharf, which by an extraordinary Flood was carried all away, brought his Bill to be relieved againſt paying of his Rent; but all the relief he had was only againſt the Penalty of the Bond, which was broken for non payment of the Rent; and the Defendant ordered only to bring Debt for his Rent. And he inſiſted, that a Surrender of Lands is no cauſe for apportionment of Rent, which is ſtronger than the Principal Caſe. The Lord Chancellor took time to adviſe; but declared, if he could, he would relieve the Plaintiff.

Frank *againſt* Frank. May 17.

A Man ſeiſed in Tail of Freehold Lands, with remainder to his Elder Brother, and of Copyhold Lands in Fee, deviſeth his Lands to his Younger Brother, and the Copyhold Lands to his Elder Brother, and dies: The Deviſees agree by Writing under their Hands, that the Lands ſhould be enjoyed by them reſpectively accordingly; and to draw on this Agreement, the Younger Brother pretends the Deviſor did ſuffer a Recovery of the Freehold

hold Lands, and produceth an Exemplification of a Recovery. Upon search it was found there was a Writ of Entry brought, and a Warrant of Attorny to appear was entred, so that had the Party that suffered the Recovery been living, he might have perfected the Recovery; but there is no Recovery of Record. The Elder Brother being informed there was no Recovery upon Record, and so the Devisor could not devise the Freehold Lands from him, and he being in truth intituled to the Copyhold as Heir at Law, and now by the Will, no Surrender being made to the use of it, brought his Action at Law to recover the Freehold Lands. The Younger Brother exhibits his Bill upon the Agreement, and pretends there was a Recovery, howbeit the Record was imbezelled, and prays he may hold according to the Agreement between him and his Brother.

And upon hearing at the Rolls it was decreed, that he should enjoy the Freehold Land, and an Injunction awarded to stay the Elder Brothers Suit.

From this Decree the Elder Brother appealed by Bill of Review, and upon hearing of the Bill of Review, it was insisted for the Plaintiff therein, That the Agreement between the two Brothers was parol only, and that the pretence of a Recovery was a Fraud, there being none, and that if there was an intention, and it was never executed, that intention can never found a Decree against the Statute de Donis, and that the Agreement doth not alter the Case, it being introduced by Fraud, there being in truth no Recovery, nor no Surrender of the Copyhold to the use of the Will. So that the Plaintiff in a Bill of Review ought to have both Freehold and Copyhold.

Maynard for the Decree. The question is not, whether the Recovery shall bar or not, but whether here is not enough to fortifie and excuse the Agreement. He insisted farther, that the Plaintiff had departed from his Title to the Freehold Lands; and tho the Agreement was not sealed, yet it was under Hand, so that the certainty of it was not to be disputed, and so replied upon the Agreement, and that in that respect the Decree was well grounded, and thereupon the Bill of Review was dismist with Costs, for modus & conventio vincunt Legem. So that in this Case the Agreement of the Party upon conceit he had not (when in truth he had) a Title to permit an

Where an Agreement tho conceived upon mistake, shall bind the Party.

another to enjoy Lands, ſhall for ever bind him; and yet this Agreement doth appear to be upon a valuable Conſideration.

In Court. The Maſter of the Rolls *in the abſence of the Chancellor.*

Colwel *againſt Sir* William Child *a Maſter of this Court.*

ALL Parties to a Suit here conſent to refer the whole matter to Serjeant Maynard finally to be heard and determined; and old Child, the now Defendants Father, ſignified his conſent by ſubſcribing a Paper for that purpoſe, ſo as the Award was made by a certain day limitted in this Paper. That elapſed, and then the Court in preſence of all Parties, but old Child, (who was then abſent) by the aſſent of his Solicitor referred it back to Serjeant Maynard; but it was not inſerted in the Order, that he ſhould finally determine: Upon this Serjeant Maynard made an Award, which was afterwards decreed, unleſs Cauſe ſhewn. Old Child ſhewed for Cauſe, that he did not conſent, and his Solicitor made Oath he did not conſent Serjeant Maynard ſhould finally determine, yet the Award was decreed. Hereupon a Bill of Review was brought and Error aſſigned; and upon the hearing of this Bill of Review, It was inſiſted, that the matter of old Childs Diſſent was Dehors, and not contained in the Decree. And it was ſaid the Court could not take notice of that, inaſmuch as there did not appear any Diſſent in the Decree it ſelf.

Errors in Law. 1. Error.

First Error aſſigned was, that the Aſſent of the Solicitor ſhall not bind the Party. Againſt which it was objected, That Solicitors are here as Attornies at Law. And if an Attorny confeſs Judgment, the party is bound by it; and that uſually Solicitors are looked upon here as Attornies at Law; as for inſtance, In a Maſters Report made in the preſence of Solicitors: But it was anſwered and reſolved by the Court, that although Solicitors Aſſent to Interlocutories may bind, yet it cannot bind to a Reference

Solicitors aſſenting to Interlocutories may bind, but not to final Reference.

ference finally to determine. And it was ſaid and admitted, that an Attornies aſſent to an Award ſhall bind his Client. And this Error was declared by the Court to be good Cauſe of Reverſal. And it was declared it ſhould not lie upon the Plaintiff to ſhew old Childs Diſſent. For it appears upon the Decrée, that it was the Solicitors aſſent; and if the Decreé want a ſufficient foundation, it is Error, and the Plaintiff ſhall not be put to ſhew a negative. And the Plaintiffs Counſel cited a Caſe betwæn Brooks and Dickens about 1652. where an Award was ſet aſide for that the party did not actually aſſent to the Reference, and yet attended the Reference in the buſineſs.

Award ſet aſide for that the Party did not actually aſſent unto the Reference.

For that the Award was but for parcel of the matter in Controverſie, and not of the whole matter, whereof the Reference was to determine, and this Error allowed.

2. Error. Award erroneous for that its but of part of the matters referred.

For that the Decreé was impoſſible; for by the Award (decréed) old Child was to pay a Sum of Mony 24 Jan. 1654. or Surrender an Eſtate. And the Decræ was dated after the ſaid 24 Jan. 1654. and ſo impoſſible. And this was allowed to be Error.

3. Error. Decree impoſſible.

For that the Award was repugnant; for it awarded old Child to deliver up an Obligation of 800 l. in ſatisfaction of 400 l. of 1000 l. which he was to pay, and to vacate a Suit in ſatisfaction of 600 l. reſidue of the ſaid 1000 l. although there was not any reſidue after the 400 l. and 600 l. ſatisfied; and this was ruled to be for Error alſo. And ſo the Decræ was reverſed.

4. Error. Decree repugnant.

That it was moved that the Solicitor who aſſented, and who was now Solicitor in this preſent Cauſe ſhould pay Coſts to the Defendant Dr. Child; but reſolved he ſhould not. For that the aſſent he gave was in Court, and the Court knew ſuch aſſent would not bind the party. And twas the folly of the other party to proceéd on that aſſent.

The

The Maſter of the Rolls.

Smith *againſt* Smoult. January 21.

Whether the Mortgage mony belongs to the Heir or Executor of the Mortgagee.

THE Queſtion was, Whether the Mortgage Mony ſhould be paid to the Heir or Executor of the Mortgagee. And it was for the Heir inſiſted, that it was ruled in a Caſe between Tilley and Egerton in Michaelmas, 1660. heard by the Lord Chancellor aſſiſted by the Lord Bridgman, there being no defect of aſſets in the Executors hands, that the Heir ſhould have the mony, who is to convey the Eſtate. And this was ſaid to be the firſt Preſident of that kind. The Court will ſee Preſidents.

And afterwards about Michaelmas or Hillary Term 1667. the principal Caſe was heard before the Lord Keeper Bridgman where the Order in the Caſe of Egerton was produced; but in the principal Caſe there appeared to be a Bond for payment of the Mortgage-mony which goes to the Executors. And the Condition of the Redemption was upon payment of the mony to the Executors, &c. (without naming the Heir.) So it was ruled in the principal Caſe that the mony ſhould be paid to the Heir: But the Lord Keeper ſaid that if the Condition of the Redemption had been to pay the mony to the Heir or Executor, and no Bond were in the Caſe, nor no want of Aſſets of the perſonal Eſtate, it might have been otherwiſe. And in the Caſe of Egerton in reading the Order it did not appear how the Condition was penned; but the Court now took it that the mony was payable to the Heir by the Condition, Saint John againſt Grabham 11 Car. 1. adjudged by the Lord Keeper, That the Heir, and not the Executor ſhould have the mony, being payable by the Condition to the Heirs or Aſſigns of the Mortgagee.

DE
Term. Sanct. Trin.
Anno Regis 19 Car. II.
IN
CANCELLARIA.

Elſton Wallis *and others, Executors of* Ann Smith *againſt Sir* Thomas Crimes *Baronet,* John Scot *Eſquire and others.* June 4.

IN 1656. Sir George Crimes Father of the Defendant Sir Thomas, (and whole eldeſt Son the Defendant Sir Thomas was) demiſed the Lands in Queſtion to Ann Smith for 2000 l. for 2000 years by way of Mortgage, Sir George then being in poſſeſſion and taken to be the abſolute Owner 19 Januar. 1643. Sir Thomas Crimes Father of Sir George had conveyed the Premiſſes to the Defendant Scot and others, and their Heirs, upon Truſt, That if Sir George within ſix Months after his Fathers death ſecured to the Truſtées 500 l. for the benefit of Sir George his younger Children, then (after ſuch Security firſt given to the Truſtées) to convey the Premiſſes to Sir George and his Heirs as he ſhould appoint: And till the time limited for giving the Security, the Truſtees to ſtand ſeized to the uſe of Sir George his eldeſt Son (which Sir Thomas is) for his Maintenance, and in default of ſuch Security, the Truſtees, at the requeſt of Sir George his eldeſt Son, to convey to him. This appearing to be the Caſe in proof upon a Bill exhibited by the Plaintiffs to inforce a Redemption, or to hold diſcharged of Equity;

The Court decreed that the Plaintiffs do hold and enjoy the Premisses for Security of the 2000 l. with Interest against the Defendants and all claiming under them, charged with the 500 l. to Sir George Crimes his younger Children from the time the Plaintiff came into possession, and that the Defendants do accordingly execute Conveyances, unless the Defendant Sir Thomas Crimes do pay the Mortgage Mony and Interest by a day.

The Defendant brought a Bill of Review to reverse this Decree, and for Error shewed that in default of giving Security in six Months after Sir Thomas his death the Trustées were to convey to the Defendant and his Heirs, and the Security was first to be given before Sir George was to have any thing in the Lands, and that Sir George being dead that was impossible, he having not given any Security.

But upon debate of the matter upon an Answer put in to the Bill of Review, and hearing of the Cause before the Lord Keeper Bridgman 28 Octob. 1668. he declared he saw no Cause to reverse the Decree, but looked upon the Condition precedent to be in the nature of a penalty, and would regard the intent of the Trust which was to secure 500 l. to the younger Children, which, with the way the Plaintiffs went in this Bill of Review, could not be. And so dismist the Bill of Review.

A Breach of a Condition precedent relieved in Equity as in the nature of a Penalty.

D E

DE
Term. Sanct. Mich.
Anno Regis 19 Car. II.
IN
CANCELLARIA.

The Lord Keeper.

Hide *againſt* Pettit. October 25.

THERE having been a Decree in this Caſe for a perſonal Duty, and a Sequeſtration awarded againſt the Defendants real and perſonal Eſtate by the late Lord Chancellor, aſſiſted by Baron Turner, it was now moved by the Defendants Counſel againſt this Sequeſtration, and inſiſted, that this Court did not anciently grant any Sequeſtration but ſparingly, and that only of the thing in demand, and that the Sequeſtration in this Caſe took more than all the Executions at Law; and that Sequeſtration had been extended ſo far of late as to ſequeſter things in Action, which no Execution at Common Law can reach, and the conſequence of which would be deſtructive to Trade and Commerce. And beſides when any Purchaſer is brought into this Court upon the Proceſs of Sequeſtration upon Sequeſtration, That this Purchaſe is ſubſequent to the Sequeſtration, or for other reaſon bound thereby, whereas many perſons ſo brought in are really Purchaſers, or have other good Titles, which neither are Argument *pro & contra.* Sequeſtration.

nor ought to be bound thereby, those persons so brought in are looked upon as Contemners and Delinquents and forced to answer Interrogatories blindfold without having a Copy of them, or liberty to shew them to Counsel, by which means persons coming into this Court to defend their Interest are often through their own unskilfulness concluded in their just Rights, even against Right, to the great dishonour of the Court and of Justice. But to maintain the Sequestration it was insisted by Fountain, That they were very ancient in this Court, and cited a Case 17 Jac. Zacheverel against Zacheverel, where a Sequestration was awarded both against Lands and Goods, and the thing decreed was a personal duty; and this Sequestration was awarded by the Court, assisted with the Judges upon view of four Presidents. Russel against Read: The Defendant being in the Fleet the mony decreed was sequestred, it being in the Fleet, this in the Lord Coventry's time. And 18 Feb. 1662. assisted with Baron Turner in this principal Case and the Case of Beddingfield and Zouch, That a Sequestration should be the usual Process of this Court, and the course of the Court is the Law of the Land, and an Executor might bring an Action here before the Statute gave it; and it was urged if you should take away Sequestration the Justice of the Court would be elusory, and that after a Suitor had been at great Charges in obtaining a Decree, if the Defendant would lye in prison there would be no remedy for the Plaintiff to come by the fruit of his Decree, and the Remedy by Imprisonment would be ineffectual, for if he go abroad no Escape lies. Upon a Judgment in a Court Baron a Levari Fac. goes which takes all the Profits of the Lands, and a Statute before a Mayor takes all. And therefore not unreasonable that so great a Court as this should have an effectual means of bringing Suitors to the fruit of their Suit, which without a Sequestration cannot be done.

Sequestration against Lands and Goods.

The Power of the *Chancery*.

And as to sequestring things in Action there is no such thing sequestred in this Case. And as to the danger of bringing persons that came in for their Interest as Delinquents by means of Sequestration and their being deprived of Counsel to answer. That is the Case of every Decree and Contempt where there is no Sequestration, and is the course there as well as in the course of Sequestrations.

The

The Court will see Presidents: And after at another time declared it was satisfied the Sequestration in the principal Case was well awarded; and that Sequestrations were a necessary Process of this Court.

Sequestration against Lands and Goods well awarded.

The Lord Keeper.

Sir Henry Henn *against Sir* Henry Conisby. October 25.

MOny of the Defendants was lent out by one Yarway to the Plaintiff upon the Security of a Mortgage and Recognizance, and the Security was taken in one Cambels Name in Trust for the Defendant: The Mony was lent 1659. and paid in to Yarway in 1663. and all Interest for the same, and Yarway during that time and a year after paid the Interest to the Defendant, but the Defendant himself kept the Security. Yarway failed, and the Question was, Whether the payment of the Mony to Yarway (who had not paid it over to the Defendant) should be taken as a good payment to conclude the Defendant.

For the Plaintiff it was laid down by his Counsel as a Rule, That where one places Mony in a Scriveners hands with this general Trust, for him to put it out where he pleaseth, there by that general Trust or Authority the payment back to the Scrivener is good payment.

And it was proved by Witnesses that the Defendant had said, He had trusted Yarway with the greatest part of his Estate, and he feared he should be cozened, which the Plaintiffs Counsel insisted on as Evidence to prove that the Defendant trusted Yarway with this Mony: But as to that it was answered by the Defendants Counsel, that Conisby lent Yarway other Monies on his own Security which he lost, so might say, He was like to be cozened by the said Yarway. But it was farther insisted by the Defendants Counsel, that the Defendant kept the Security himself, which clearly shewed that Yarway did not act under such general authority as was alledged by the Plaintiffs Counsel. And it was insisted, that that one Circumstance would rule the Case; and no man will pay the Mony due upon a Mortgage and Recognizance (no not on

Whether Mony paid by the Borrower to the Scrivener that is imployed in lending of the Mony, without taking up the Security, be a good payment to conclude the Lenders.

on a Bond) without having the Security up and the payment of the Mony by the Plaintiff to the Scrivener without having up his Security, was an Evidence that he did truſt the Scrivener more than the Defendant did (who always kept the Security himſelf) and he that truſted moſt is to be cozened.

A Caſe betwæn Sir Gilbert Gerard and Baker was cited by the Defendants Counſel where Mony was paid to one that did uſually receive for the Obligæ, yet the Obligæ not truſting the Receiver with the Bond, it was held no good payment.

The Court conceives the Caſe is againſt the Plaintiff in regard the Defendant kept the Security, but will ſee Preſidents, Engliſh againſt Lee, a Preſident cited by the Plaintiff in 1655. And after the Court had peruſed the Preſidents on both ſides, Paſch. 1668. Judgment was given for the Defendant, That the payment to the Scrivener ſhould not conclude him; but he was ordered to take the Principal without Coſts.

DE

DE
Term. Sanct. Hill.
Anno Regis 19 & 20 Car. II.
IN
CANCELLARIA.

The Lord Keeper.

Mary Thomas *Widow, againſt* Edward Porter, Phineas Porter *and* Robert *Biſhop of* Worceſter. February 8.

THE Plaintiff was Tenant durante Viduitate of the Lands in Queſtion being Copyholds of a Manor whereof the Defendant the Biſhop was Lord, Remainder to Edward Porter. The Plaintiff had felled Trees which at a Court Baron was preſented and found a Waſt, and conſequently a Forfeiture by the Homage, and the Defendant Edward was afterwards at another Court after an Entry made by the Biſhop for Forfeiture, admitted, and brought Ejectment, and before a Judge of Aſſize had a Verdict.

To be relieved againſt which was the Bill which did ſuggeſt that the Timber that was cut was worth but 40 s. and the Eſtate 60 l. per annum, and that there was 300 l. worth of Timber ſtanding, and that if upon Examination it ſhould appear to be waſt, the Plaintiff would make ſatisfaction.

The Defendant Porter by Anſwer inſiſted, that the Waſt was voluntary, and declared to be ſo by the Judge of

of Assize before whom the Judgment was, and that the Timber felled was worth 60 l. Upon the Pryals there was a great difference touching the value of the Timber felled, and some proof of a Load or two of Boards that were carried off the Premisses by the Plaintiff, which for her was insisted were carried to another Copyhold within the same Manor; but there was not any proof, that the Plaintiff had sold any of the Timber she felled; and it was proved the Copyhold in Question was much out of Repair, and for the Plaintiff insisted, that with that Timber she intended to repair the same.

The Lord Keeper. It was not clear there was any wilful Forfeiture, for that the Defendants before the Plaintiffs had applied the Timber, took the Forfeiture, and the Defendants were ever forward therein, and yet withal declared, that in case of a wilful Forfeiture he would not relieve, and then referred the Cause to the Bishop, the Defendant, to be Chancellor in this Cause.

Upon this the Bishop certified the Wast to be wilful, and no ground to relieve the Plaintiff.

Upon this Certificate the Cause coming to be heard before Justice Tyrrel (in absence of the Keeper) he pronounced an Order to dismis the Bill, which being staped by a Petition to the Lord Keeper, 11 November 1668. he reheard the Cause, at which time it was insisted for the Plaintiff, That the Lord Keeper could not delegate his Jurisdiction to the Bishop as the Order on the first hearing did mention, which was admitted; and it was made out by Affidavits, that the Bishops Son had taken a Bond from the Defendant Porter for 50 l. if the Cause went for the Defendant Porter.

A Forfeiture of a Copyhold by felling of Timber relieved in Equity.

Upon this hearing it was referred to a Trial at Law upon this Issue, whether the primary intention in felling the Timber was to do wast? But as the Order was drawn up the Issue to be tryed was, whether the supposed Wast was wilful or not.

And upon two several Tryals it was found for the Plaintiff; and so after these two Tryals, It was decreed the Plaintiff should be relieved, and the Defendant to deliver Possession, and Account for the mesne Profits.

In

In Court. The Master of the Rolls.

Saint John *Esquire against* Holford *Baronet, and others.* February 9.

THE Defendants Grandfather (whose Heir and Executor the Defendant is) became bound with the Plaintiffs Father (whose Heir the Plaintiff is) in several Bonds, as his Surety for 4000 l. The Plaintiffs Father conveyed the Manor of Colwerton by way of Mortgage to the Defendants Grandfather to counter-secure him against the said Bonds for 4000 l. The Plaintiffs Father prevailed with the Defendants Father to become bound with him afterwards for 2000 l. more. Then the Plaintiffs Father paid off 1500 l. of the 4000 l. Debts by Bond.

The Bill was to be admitted to redeem upon payment of what the Defendants Grandfather or himself had paid off or been dampnified by the Bonds for the 4000 l. and what remained unpaid of the 4000 l. And the Question was whether the Plaintiff (inasmuch as there was no Agreement proved that the Mortgage was to be a Security to the Defendants Grandfather against the Bonds for the 2000 l. as well as those for 4000 l.) should be admitted to redeem upon payment of the 4000 l. without the 2000 l. And it was ruled and so decreed, that if the Plaintiff would redeem he should reimburse and save harmless the Defendant as well touching the 2000 l. as the 4000 l. Upon this Rule, He that will have Equity to help where the Law cannot, shall do Equity to the same Party against whom he seeks to be relieved in Equity.

Counter Security given against one Debt shall extend to be Security against another Debt.

He that will have Equity must do Equity.

Serjeant Maynard and Fountain were of Councel in this Case with the Plaintiff, and did without any debate rest in this Order. Serjeant Fountain said it was a just Decree.

Hill. 1667. Upon an Appeal to the Lord Keeper Bridgman the Decree was confirmed.

Gore *againſt* Blake.

THE Caſe being ſtated by Order, came this day to be determined; and in effect it was thus. A. by his Will, whereof he makes B. his Executor, Deviſeth (inter alia) that B. ſhall take the Rents and Profits of his Lands of Inheritance for fifteen years, in Truſt to pay his Debts, and upon other Truſts. And after ſeveral particular Legacies bequeaths all the reſidue of his Goods and Chattels to B. his Executor. It falls out that all the Debts are paid and all the Truſts performed, and there is an Overplus of the fifteen years beſides what was ſufficient to pay the ſame.

The Queſtion was between the Heir and the Executor of B. who ſhall have the Remainder of the fifteen years after the Debts paid and Truſts performed. For the Heir it was ſaid there was a difference between this Term, being out of the Inheritance, and a bare Chattel, and that the Overplus of this Term being out of the Inheritance ſhould attend it, and there was not any intention in the Teſtator to give the Executor the Profits for fifteen years otherwiſe than to make proviſion for payment of his Debts and thoſe other Truſts; and that the end being ſatisfied the reſidue of the Term did ceaſe and return to the Inheritance. But for the Executor it was inſiſted that the fifteen years was a Term, and then the Deviſe of the reſidue of the Goods and Chattels did paſs.

Whether the Overplus of the Profits of a term deviſed out of an Inheritance, in Truſt to pay Debts to the Executor, who is reſiduary Legatee, doth belong to the Heir or Executor.

Curia. The Term is in the Deviſee, and there paſſed an Intereſt, and if it had been deviſed the Executor ſhould take the Profits for fifteen years; and then the appointing the Debts to be out of the Profits, and the other Truſts doth not alter it, ſo conceives the reſidue of the Term belongs to the Executor, and not to the Heir; and ſo decreed. Tamen quære.

Sir

Sir Joſeph Douglaſſe *and his Wife againſt* William Waad.

James Waad the Defendants Father having married a firſt Wife, did in her Life time many years before her death, by ſeveral Fines and Deeds ſettle the ſeveral Manors of Buttles and Payton Hall, to the uſe of himſelf for Life, Remainder to his firſt and all other his Sons in Tail. Afterwards the firſt Wife dies without Iſſue; then James Waad marries with the Daughter of Eltonhead, but before Marriage agrees with Eltonhead that in conſideration of 1000 l. Portion, which Eltonhead was to pay her, to ſettle her a Joynture of 300 l. per annum, (of which it appeared in the Caſe Buttles Manor was to be part) but what the other Lands were that were to make up the 300 l. per annum did not appear. James Waad hath Iſſue by his ſecond Wife the Defendant, and dyed, leaving the ſecond Wife, who married Douglaſſe the Plaintiff.

Their Bill is againſt the Defendant to have him decreed to ſettle the Joynture on the Defendants Mother, and to ſet aſide the Settlement made by James Waad againſt the Joyntreſs as fraudulent.

When this Caſe was firſt brought to hearing there was no proof of payment of the 1000 l. Portion by Eltonhead, but it proved that Eltonhead maintained James Waad, and furniſhed him with Mony for other Uſes.

And it was inſiſted on the Plaintiffs part, that Marriage was a good conſideration to make the Joyntreſs a Purchaſer, and it was her Father that was to pay the 1000 l. and not ſhe, and ſo ſhe was clearly a Purchaſer. If a Man ſecure his Purchaſe Mony, its payment. And to this Opinion that ſhe was a Purchaſer, the Lord Chancellor inclined. And the Plaintiffs Counſel, Serjeant Maynard and Fountain, inſiſted, that the Joyntreſs being a Purchaſer, the Settlement being after the Marriage of the firſt Wife was fraudulent as to the Jointure, which the ſecond Wife claims by the Marriage Agreement.

Marriage a good conſideration to make a Feme a Purchaſer.

Security of Purchaſe Mony is payment.

On the Defendants part it was inſiſted, the firſt Conveyance was good, and cannot be ſet aſide by the Marriage Agreement: For it was not in the power of the Fa-

ther after the first Settlement to avoid it, and every voluntary Conveyance is not fraudulent. The Chancellor of Oxfords Case, Merry and Littletons Case, 10 Jac. Fraud is not to be presumed. And this Conveyance was by Fine, and so notorious and upon Record, and there could not be any intention of Fraud as against the second Wife; and its rare that this Court takes upon them to judge a Deed fraudulent.

Every voluntary Conveyance is not fraudulent.

To which it was replyed, Fraud is only cognizable here, and was only proper here before the Statutes, and every voluntary Conveyance is presumed to be fraudulent unless he, that claims by it, can prove the contraty.

But *prima facie* its presumed to be fraudulent.

The Lord Chancellor inclines, the Joyntress is a Purchaser, and whether the Deed be fraudulent proposes to have it tried, but after referred to a Case. And a Case being stated to the effect ut supra, with this more, that there was a Release given by James Waad for the Portion 25 Feb. 19 Car. 2. the Cause came to be heard before the Lord Chancellor and Baron Turner.

At which time the Court declared the Marriage was a good consideration to make the Feme a Purchaser; and besides upon the Release for the Portion it was clear she was a good Purchaser, and that all voluntary Conveyances are prima facie to be loked upon as fraudulent against purchasers, unless the contrary be made appear, and so decreed the Settlement by James Waad to be set aside as fraudulent.

A voluntary Conveyance precedent, as to a Marriage Agreement subsequent, is fraudulent.

The Defendant brought a Bill of Review, and assigned for Error, that it was not cognizable here whether a Deed were fraudulent, but that was only tryable at Law; and besides no colour of Fraud against the Jointress; for the Deed, as appears by the Decree, was made in the Life of the first Wife, who lived ten years after, and the second Wife not then thought on. And the Settlement being by Deed and Fine, ought not to be presumed fraudulent without proof: And it was farther assigned for Error, that by the Decree the Settlement as to Payton Hall was to be part of the Joynture, she was not, as appeared, any Purchaser as to that, and so no reason to set aside the Settlement, as to Peyton Hall, under the notion of the Joyntress being a Purchaser, for that it did not appear that that was within her pretended Purchase.

To

To this Bill of Review the Defendants demurred, and insisted that the Decrée was well grounded, and upon debate thereof before the Lord Chancellor and Baron Turner in Trinity Vacation 19 Car. 2. The Demurrer, as to the Points above, was allowed.

But as to another particular touching the mesne profits (which Point I have not stated) the Plaintiff in the Bill of Review was upon arguing of the Demurrer relieved, and the Decrée so far explained (that is to say) Whereas by the Decrée the Defendant was to Answer, and pay all the Arrears of the 300 l. per annum to the Joyntress since his Fathers death, whereas it appears by the Decrée, that by a former Decree of the Court the mesne Profits had bèen applyed first to the payment of Eltonheads Debts, and afterwards bèn taken by the Lady Waad, and the Defendant was neither charged as Heir or Executor to his Father, nor had any Assets to answer the Arrears.

It was ordered that the Defendant should be chargable only with so much Arrears as he had received out of the Lands.

DE
Termino Paſchæ
Anno Regis 20 Car. II.
IN
CANCELLARIA

The Lord Keeper.
The Maſter of the Rolls.

Pearſon *againſt* Pulley. 25 April.

THE Bill being to redeem a Mortgage made in 1632. and it being inſiſted on by the Defendant, that he came in as an Aſſignee at the third Hand, and ſo it would be hard to put him to an Account now, the Lord Keeper ſaid, That in regard there had been no ſtint put to the time, a Mortgage is to be redeemed, the Defendant ſhall come to an Account; but in regard he comes in at an old Hand, ſhall not account but ſo far only as goes in diſcount of his Mony, but not for the Surpluſage. And he ſaid he would have a Rule to limit to what time a Mortgage ſhall be redeemable, and conceived twenty years to be a fit time in imitation of the Statute of Limitation of real Actions: But gave no Rule in that, but only he directed, that when a Bill came to redeem an old Mortgage, the Defendant ſhould plead or demur to it, that ſo the Judgment of the Court might be had upon it.

Special directions touching old Mortgages.

The

The Lord Keeper.
The Master of the Rolls.

David Jenkins *Esquire against Sir* Charles Kemis *Baronet, and others.* April 28.

EDward Kemis Esq; deviseth the Lands in question after other Estates Tail (which are all spent) to Sir Nicholas Kemis for life, Remainder to his first Son, and the Heirs Males of his Body, with other Remainders over, Sir Nicholas hath Issue Charles, Father of the Defendant Charles. In 1637. the Defendants Father married Blanch the Daughter of Mansel, with whom he had 2500 l. which Sir Nicholas had, and thereupon Sir Nicholas and Charles his Son levied a Fine and suffered a Recovery, and five years after, viz. 1 April, 18 Car. 1. by Indenture tripartite, whereto Sir Nicholas and Charles his Son are both Parties named, and tho Charles never sealed, yet he consented to the use thereof, reciting that Nicholas was Tenant for life, the Remainder to his Son Charles prout and the Marriage of Charles prout, and that his Wifes Portion was 2500 l. and that Sir Nicholas had it, and the Fine and Recovery had thereupon, and in consideration thereof, the Uses of the Fine and Recovery are declared to be to Sir Nicholas for life, the Remainder to his Son Charles, and the Heirs Males of his Body, begotten on the Body of Blanch, the Remainder to the Heirs Males of Sir Nicholas, the Remainder to the Heirs Males of the Body of Sir Charles the Defendants Father, the Remainder to the right Heirs of Sir Nicholas, with a Power to Sir Charles by Deed or Will to charge the Land with 2000 l. as he should think fit. After in January 18 Car. 2. the Marquess of Worcester borrows of the Plaintiffs Father 2000 l. which was applied to the Kings Service, and prevails with Sir Nicholas Kemis and Charles his Son, then both under his command, by Lease and Release to convey the Premises to the Plaintiffs Father, in Fee, by way of Mortgage, wherein they covenant to make farther assurance; the Mortgagors continue possession, and die; the Defendant is eldest Son and Heir of the said Charles Kemis by a second Wife, Blanch being dead without Issue, but claims the

the Premiſes as Iſſue in Tail by the Settlement as Son and Heir of his Father. The Mortgagee brought Ejectment againſt the Defendant, and thereupon a Special Verdict, ut ſupra, and upon argument ruled againſt the Plaintiff; whereupon the Plaintiff being as well Executor as Heir to his Father, brings his Bill in Equity, ſuggeſting the tripartite Deed antedated, and however to be meerly voluntary and fraudulent as to the Defendant, he not being the Iſſue of Blanch, and ſo not within the conſideration of the tripartite Deed and Settlement, and the Plaintiff being a Purchaſor, and the Defendants Father or Grandfather being taken by the Plaintiffs Father to be ſeiſed in Fee when they made the Mortgage. And it was farther inſiſted on by the Bill, That Sir Nicholas having a power to charge the Premiſes with the payment of 2000 l. and the Mortgage being for 2000 l. tho it were by way of Conveyance of the Lands, and not by a charge of the Lands, and ſo according to ſtrictneſs of Law not good, yet in Equity it ought to be taken as in Execution of the Power, and that nice legal Defect ought therefore to be ſupplied in Equity to the Plaintiff who is in under a Purchaſer.

Whether a legal defect in execution of a power may be ſupplied in Equity.

For the Plaintiff it was farther inſiſted, That Sir Nicholas's Power ought to be knit to his Intereſt, and ſo come in ſupply of his Intereſt to make the Mortgage good. And if a Perſon that hath power to charge Lands for a Sum of Mony, do for the like Sum convey Lands to an other, and covenant to make farther aſſurance, (as here,) Equity will compel him to execute his Power to the benefit of the Perſon from whom he hath received the Mony. And the Defendant was Heir to Sir Nicholas and his Father, and bound by their Covenant to farther the aſſurance.

Whether if a Man that hath power only to charge Lands, conveys them for ſo much as he hath power to charge them, which ſhall in Equity inforce him to execute his power to the ſame Perſon.

Whereunto it was anſwered by the Defendants Counſel, That the Defendant does not claim as Heir to his Father or Grandfather, but by the Settlement, and that he was Heir Male of the Body of his Father, and was within the conſideration of the 2500 l. Portion which the Grandfather had, and which belonged to the Father; and however if that Settlement had not been made, the Defendant was Iſſue in Tail by the Settlement made by Edward Kemis his Will. And it was farther inſiſted, that the Mortgage by which Sir Nicholas had power to charge the Lands was diſcharged, he having conveyed all his Intereſt out of him thereby, and that ſo he was diſabled to execute his Power after. And it was alſo inſiſted for the Defendant, That Equity in

in this Caſe ought to follow the Law, the Defendant claiming by precedent Title to the Plaintiff in ſuch manner, that there was no Equity to bind it farther than by Law it is bound; and in truth it did appear (howbeit it was not found in the Special Verdict) that Sir Nicholas did after the Mortgage to the Plaintiffs Father, in purſuance of his Power charge the Premiſes with 2000 l. Debts which he owed, which Debts the Defendants Father paid accordingly.

Where a power to charge Lands ſhall be deſtroyed by the Conveyance of him that hath the power, and where not.

The Lord Keeper conceived the Power was not deſtroyed by the Mortgage, becauſe it was by Leaſe and Releaſe, and not by Fine or Feoffment. Yet both He and the Maſter of the Rolls were of Opinion that the Plaintiff could not be relieved in Equity. Nevertheleſs at the Plaintiffs importunity he directed a Caſe to be made, and after Michaelmas Term 1668. he diſmiſt the Bill.

The Lord Keeper.
Juſtice Tirrel.
Juſtice Rainsford.

Haynes *and others Executors* | *of* Smithby *againſt* Harriſon *and others Farmers of the Cuſtoms.* May 19.

On a Demurrer to a Bill of Review.

THE Bill was, a Bill of Review to reverſe a Decree made by the Lord Chancellor Hide, for that by that Decree all Intereſt due on ſeveral Securities by Bond and Judgments, and Coſts at Law ſuffered before the firſt Bill in ſuing thoſe Securities, were taken away upon a pretence that the Mony lent the Defendants by the Plaintiffs Teſtator, was paid by them to the King in conſideration of their Farm of the Cuſtoms which they did not enjoy, whereas their Teſtator was not concerned in the Bargain; and if diſpoſing Mony by the Borrower, and any accident befalling it afterwards ſhould create an Equity againſt the Creditor, it would deſtroy all Commerce. And by the courſe of the Court, which is the Law of the Court,

Errors aſſigned.

Where Intereſt is due on a Bond, and the Debtor pay any Sum leſs than the Intereſt, the payment is to be accounted Intereſt only.

where Intereſt is due on a Bond, and the Debtor pay any Sum leſs than the Intereſt, the Payment is to be accounted Intereſt only, yet the Decree allows ſuch Payments (although they were much leſs than the Intereſt than due) for Principal. And the Court hath alſo taken away the Plaintiffs Coſts at Law, tho by the Decree 800 l. is ſtill due to the Plaintiffs on legal Securities, and the Proceedings and Coſts at Law were before any conſiderable part of the Principal was paid, taking the Intereſt for the Principal, as the Decree doth, ſo that the Proceedings were legal, and without thoſe the Plaintiffs Teſtator could not recover his Debt, and ſo ought to be allowed thoſe Coſts.

Intereſt upon a Debt due by Specialty and Coſts at Law may upon Circumſtances be taken away in Equity.

The Defendants demurred, and inſiſted that there is no Error in the Body of the Decree, nor new Matter to reverſe it, and inſiſt that this Court ever had a Power upon Circumſtances to relieve againſt Penalties, Judgments and Executions, and to abate and moderate, and ſometimes diſcharge Damages and Coſts. And it was inſiſted it had exerciſed ſuch Power in the Lord Keeper Coventries Time. And the Court did declare this Court had a Power upon Circumſtances to abate and moderate Coſts and Intereſt, and ſometimes to diſcharge them, and they muſt take the Decree as they found it, whereby it appears Smithbys Debt was ill made up, and that the Farmers became bound in conſideration of their Farm which they did not enjoy, and Coſts are in the diſcretion of the Court, and Coſts diſcharged there, becauſe there was no oppreſſion. And ſo the whole Court declared they could not go out of the Decree, and ſaw no cauſe to reverſe it, and ſo diſmiſt the Bill.

D E

DE

Term. Sanct. Trin.

Anno Regis 20 Car. II.

IN

CANCELLARIA.

The Lord Keeper.
Chief Baron Hale.

Cuthbert Morely *Esq*; *against* Jerome *and* Henry Elways. June 1.

THE end of the Plaintiffs Suit is to have the Redemption of a Mortgage, made by the Plaintiff and his Father James Morely Esq; in December 1641. to Jerome Elwaies Father of the Defendants Jerome and Henry. Against the Plaintiffs relief the Defendants set up a Releale made by the Plaintiff in 1646. of all his Equity of Redemption, and a Decree made by the Lord Chancellor Hide in this Cause in 1663. which Decree is penned as if made by consent. This Decree being signed and inrolled, and the Plaintiff not able to perform the same, could not have a Bill of Review, nor could he be relieved by such Bill, if it had been brought, the Releale barring all his pretences, and that being upon a secret Trust, he could not prove the

Releaſe of Equity of Redemption.

Truſt poſitively, the Witneſſes being dead, and ſo he was not relievable neither in Law nor Equity. Whereupon the Plaintiff and Baron Greenvil Eſq; petitioned the Lords Houſe the laſt Seſſions of Parliament for relief againſt the ſaid Decree and Releaſe. The Cauſe held many Debates at the Bar of the Lords Houſe before Chriſtmas 1667. The great Queſtion being, Whether the Releaſe was made in Truſt, or bona fide for a valuable conſideration. The proofs offered to evidence the Truſt were circumſtantial, and not direct poſitive proofs. One thing offered by the Plaintiffs to evince the truth of their aſſertion to their Lordſhips in affirming the ſame to be only a Truſt, was, That their Lordſhips would pleaſe to conſider what Debts were due from the Plaintiff or his Father to the Defendant when the Releaſe was made, and with that to take notice of the value of the Eſtate releaſed at the time of the making thereof. As to the reading the Proofs to both theſe, the Parliament being to adjourn in two days, and there not being time, their Lordſhips adjourned the conſideration of theſe two things, and reading the Proofs to the value of the Eſtate, deſiſted until their next meeting after Chriſtmas.

The Lord Keeper preſent thus far.

But the next meeting after Chriſtmas the Lord Keeper being abſent, the Lord Privy Seal ſat on the Wool-pack, and the Cauſe had two days hearing when all the Plaintiffs and Defendants Proofs were read to the values; and the Houſe, after ſeveral days debate of the Matter, being ſatisfied that by the Proofs it clearly appeared that the value of the Lands was much greater than to make a ſatisfaction for the Debt for which it was releaſed, did adjudge the ſaid Releaſe to be a farther Truſt to pay 80 l. per annum to the Comptroler for Life, and ſet aſide the Decree aforeſaid, and referred the Cauſe back to the Court to proceed as in the Caſe of an equitable Mortgage, which their Lordſhips adjudged this to be.

Lunæ primo Junii 1668. This Cauſe was heard in Court, when a Decree was made for the Defendants to come to an Account, and the Plaintiff to be admitted to the Redemption of his Eſtate: The ordering part is as followeth.

First,

First, That Jeremy Elways come to an Account for all the Profits of the Lands in Question, which he or his Father, or any other to his or their use, or by their direction or appointment, have or might without their own wilful default have received. That Sir William Glascock should take the account, but with this direction, that in Case the Lands mortgaged in Fee were not a sufficient Security for the Mony due to the Defendants Father, and for which he now stands engaged for them, and the pre-engagement that was thereupon at the time of the Defendants Fathers taking the Sequestration over, and besides the other Lands mortgaged, in which at the time of the Defendants Entry and the Release made, the Plaintiff had only one Estate for Life, that then the Defendant shall be charged in the Account no more for the Lands held for the Plaintiffs Life than the Master shall really judge them to be worth, without respect to the benefit that hath happened by the continuance of the Plaintiffs Life.

A Mortgage for an Estate for Life on an old Mortgage shall not account for more than the Estate had been worth to be sold.

The Plaintiff grieved with this direction, procured a Re-hearing by the Lord Keeper, assisted with the Lord Chief Justice Vaughan and Chief Baron Hales, and they confirmed this Order, and that in respect of the contingency of the Estate, and not for what was made, the Mortgage being above twenty years old.

Yet upon Appeal in Parliament ordered otherwise.

For the Plaintiff it was insisted, That this was a new direction without a President, and that it was safer to judge what was, than what might have been; and that at this rate the Western Estates would not be mortgageable.

The Plaintiff by Petition complained of this direction to the Lords in Parliament, and upon a solemn Hearing at the Bar of the House, he was relieved; and the Lord Keeper ordered to direct the Mortgagee to account for the whole Profits of the Estate for Life, as in the Case of other Mortgagees.

Baron

Baron. Turner.

Delamere *againſt* Smith *the Executor of* Smith.

THE Plaintiff having had great dealings with Smith the Teſtator, for Vault and other things bought by the Plaintiff, by that means he became indebted to the Defendants Teſtator in ſeveral great Sums, for which he gave him Security by Mortgage, Bond and otherwiſe.

Afterwards the Plaintiff became a great loſer by the badneſs of the Vault he bought of the Defendants Teſtator, and other accidents, and thereupon Smith and he came to a new Agreement, that in conſideration of 80 l. lately before paid, and of 70 l. paid on the Plaintiffs behalf by one Tubbing the Plaintiffs Father-in-Law, and of 40 l. more promiſed by Tubbing at a ſhort day, that if the 40 l. were paid accordingly, that then if the Plaintiff ſhould pay Smith 800 l. in four years by 200 l. per annum, that the ſaid Smith would deliver up the Plaintiff all his Securities, &c.

The Mony was all paid to Smith the Teſtator but 104 l. though not at a preciſe day; ſo to have thoſe Securities up upon paying what was unpaid upon the laſt Agreement, with damages from the time it ſhould have been paid, is the ſcope of the Bill.

In this Caſe it was inſiſted for the Defendant, that where a greater Sum is due by ſpecialty, and a leſs agreed to be taken for it to be paid in certain Sums at certain days, if the Agreement be not ſtrictly purſued, and the Monies paid preciſely at thoſe days, but part of the Mony paid at other days, a Court of Equity ought not to oblige him that made that Agreement (in favour of the perſon failing to perform it) to ſtand to it upon payment of ſo much as will make up the Mony paid ſince the laſt Agreement with Damages for the ſame from the reſpective times the ſame ſhould have been paid by that Agreement, to the times the ſame were paid, and Damages for what remains unpaid, till the ſame be paid. But if the Plaintiff would have any benefit by the Agreement, he ought literally to have performed

Whether when a leſſer Sum is agreed to be accepted at preciſe days in lieu of a greater, If he that is to pay, fails in payment at thoſe days, he ſhall not have any benefit by that Agreement.

perfoꝛmed it, which was in his favour and without any penalty; and theꝛefoꝛe inſiſted that the Plaintiff was not to have any benefit by that Agrément.

The Baron oꝛdered this matter to be made into a Caſe; but as yet nothing done therein. And it is to be obſerved in this Caſe, that part of the Conſideration of the Agrément was, that Tubbing (who was not obliged by any foꝛmer Security) had paid Smith 70 l. and undertook to pay him 40 l. moꝛe; ſo Smith bettered his Security, &c.

Degg *againſt* Osbaſton.

THE like Caſe with that of Hen and Conisby, antea fol. 93. and upon ſolemn debate ruled as that was: And in both theſe Caſes the Moꝛtgagée was oꝛdered to take his Pꝛincipal without his Intereſt; and time was given foꝛ payment of the Pꝛincipal (viz.) a yeaꝛs time.

Mony paid in by the Borrower to the Scrivener, no good payment to conclude the Lender.

DE
Term. Sanct. Mich.
Anno Regis 20 Car. II.
IN
CANCELLARIA.

The Lord Keeper.

Sir Geoffry Palmer *the Kings Attorny General on the behalf of* Jerome Smith, *a Lunatick, againſt Sir* Robert Parkhurſt *and others.* Octob. 26.

THE Bill did ſuggeſt, that by Inquiſition taken before the Mayor of London, by virtue of a Writ to him directed, the ſaid Jerome Smith was the 23d of June, 1664. found a Lunatick, and had lucid intervals, and had not ſufficient government of himſelf, his Lands and Goods; and that he was Lunatick the laſt of June, 1647. and during his Lunacy he had ſeveral Sums of Mony due to him which he had waſted, and alienated divers Goods, but to whom the Jurors were ignorant. And did charge that one Archibald owed the Lunatick during his Lunacy 1300 l. by good Security, and that in 1656. the Defendant cauſed the Lunatick to aſſign Archibalds Debt to him, and had received the ſame upon colour of a ſatisfaction given to the Lunatick for the ſame, whereas that pretended ſatisfaction was not valuable, and was done in prejudice of the Lunatick: And to have an Account

count of the 1300 l. and to be relieved, was the ſcope of the Bill.

The Defendant ſets forth by anſwer, that he ſold the ſaid Jerome Smith in 1656. a Manor, which he much deſired to buy, at 1200 l. it being the place of his Birth; Jerome Smith aſſigned Archibalds Debt for to ſatisfie himſelf the Purchaſe Mony, and pay the Overplus to Smith, which he did, and did convey the ſaid Manor to Smith, and inſiſted that Smith was not a Lunatick at that time, but did uſually buy and ſell, &c.

This being the nature of the Caſe it came firſt to be heard before Juſtice Tyrril, who although it did appear that the Defendant had coveyed the ſaid Manor to Smith for the ſaid 1200 l. and that Smith did at that time uſually barter, and was not found a Lunatick till eight years after, with a retroſpect of ſeventeen years, did order the Defendant to account for the 1300 l. being Archibalds Debt, and to ſatisfie the ſame with Damages, without any proviſion for the Defendants having the Manor again, or account for the meſne Profits. And though it was ſtood upon at the Hearing, that in caſe of a Lunatick (where the King hath no Intereſt in his Eſtate, but as Pater Patriæ commits him to another to manage it for him, the Lunatick in caſe he recover his Senſes and Wits ſhall have his Eſtate again, and if not, it will go to his Adminiſtrators) the Lunatick himſelf (as in the Caſe of an Infant) ought to have been a Party: Yet that Opinion was overruled by the Judges, and by the Lord Keeper on a Re-hearing. But the Lord Keeper did ſtay the paſſing the Decree, and gave Liberty to the Defendant to traverſe the Inquiſition.

A Bargain by a Lunatick eight years before the Lunacy found, avoided by being found a Lunatick with a retroſpect of ſeventeen years. Yet the Party admitted to traverſe the Inquiſition.

Note, That generally a Lunatick ought to be made a party: But the reaſon why it was over-ruled here, was, that he might ſtultifie himſelf.

The Lord Keeper.

Carter *and others, Creditors of* Church, *againſt* Church *alias* Weſtin *and others.* Octob. 28.

CHurch deviſeth ſome part of his Lands and Tenements to his Executors to ſell for payment of his Debts, and the reſt of his Lands he deviſed to marry his Daughter, in Fee, being then a year old, and declares that his Executors ſhall receive the Profits of thoſe Lands

Deviſe of Profits till a Child come to one and twenty years, is a good Deviſe of a Term till the Child would be one and twenty, though he die before.

until his Daughter come to the age of one and twenty Years, towards payment of his Debts and Legacies. The Daughter died at five years old; the Lord Keeper was of Opinion, that the charging the Profits till the Daughter attained one and twenty (though ſhe died before) amounted to a Term till ſhe would have attained that Age, if ſhe had lived; and cited Boruſtans Caſe, 3 Co. and a Caſe in Dyer, where Lands were given to a Mother for Education and Maintenance of the Daughter till eighteen years old; the Daughter dyed before eighteen, yet adjudged a good Term to the Mother till ſhe would have attained eighteen, had ſhe lived. And he ſaid that the Principal Caſe was much a ſtronger Caſe.

The Lord Keeper.
Juſtice Windham.

Jacob Aſh *againſt* Gallen. November 18.

IT was declared that a Uſe upon a Uſe will not riſe by Bargain and Sale, Dyer 155. and Chudleys Caſe, Co. Rep.

But for the Plaintiff it was inſiſted, that though a Uſe could not riſe as a Uſe upon a Uſe, yet as a Truſt it would in Equity. And a Caſe was ordered to be made, which was this:

Iſaac Aſh with his own Mony bought Lands of 100 *l.* per annum, and took the Conveyance by Indenture in theſe words, Grant, Bargain, Sell, Alien, Enfeoff and Confirm to Iſaac Aſh his Executors and Aſſigns; To the uſe of Iſaac for Life; Remainder as to one third to his Wife for Life, Remainder to Jacob Aſh and to his Heirs (whoſe Heir the Plaintiff is) with a Letter of Attorny to make Livery. The Deed is acknowledged and duly enrolled in Chancery. Two Months after Inrollment Livery is made and indorſed on the Deed. The Plaintiff and Defendants Wife were both Grandchildren to Iſaac Aſh, who by Leaſe and Releaſe did convey the Lands in Queſtion, the one moiety to the Plaintiff, and the other moiety to the Defendants and their Heirs; and the Plaintiff did not except to this diſpoſition in Iſaacs Life, which if he had, Iſaac would (as was inſiſted for the Defendants) have otherwiſe provided for them,

them, he having given every Grandchild to the value of 50 l. per annum, but the Defendants, to whom he gave nothing but the moiety of the Premisses.

For the Plaintiff it was insisted, that Isaac intended to take the Estate by Feoffment, and that the inrolling of it first was only for safe custody of the Deed; and that however the Uses upon a Use would not rise in Law, yet in Equity they were good by way of Trust.

Whether a Use upon a Use in a Deed inrolled be to be supported in Equity as a Trust.

For the Defendant it was argued thus upon private discourse of Counsel, that Isaac having by the Deed an Election to take it either by Feoffment (which if he did, it would not be in his power otherwise to dispose it) or by Bargain and Sale, whereby he might have power to dispose the Estate as he pleased; and he having elected to take it by Inrolment, and disposed the same by Act executed in his Life, it was apparent he intended to take it so as to dispose it, and therefore no reason in Equity to make any other operation of this Conveyance than the Law made.

There was some diversity of Opinion amongst Counsel touching this Case; but the Parties agreed among themselves, and it was not argued at all.

The Lord Keeper.
Justice Twisden.

Read *against* Read. November 25.

The Lady Read, Wife of Sir John Read, had by Petition got a Ne exeat Regnum against her Husband, upon suggestion that she having gotten a Sentence for Alimony against him in the Spiritual Court, he refused to obey it, and in avoidance of it threatned to go beyond Sea.

The Husband moved for a Supersedeas of this Writ, and whether it lies in this Case was the Question.

For the Huband it was said, that every man may travel where he will, unless he be prohibited by the Kings Writ, Dyer 296. This Writ is a Prerogative Writ, which the King may use as he hath the care of his People, 2 Inst. 54. A Writ de Securitate invenienda not to go beyond the

The nature of a Writ of *Ne exeat Regnum*.

Seas, lies not against a Layman, but a Clergyman only, qui habet Curam Animarum, and they are to maintain the Laws of the Church, which if they went beyond the Seas they might adhere to the Pope, and they have no temporal Estate to oblige them to stay here, and this Writ ought to be indorsed Patronus sequitur hoc Breve; but in this Case no Patron, no Clergyman. 19 Jac. in the Case of Welby and Stevens at the Suit of his Creditors which were many, there this Writ was granted; but a Bill was filed, and none here, Crisp against Bishop, 15 Car. 2. The Writ granted upon Suggestion he was indebted; but on putting in Security, it was superseded.

On the other side, for maintaining of the Writ, and on the behalf of the Lady it was said; The King may restrain a Subject from going out of the Realm, Knowls against Luce, Moor 109. Selden's Janus Angliæ 92. saith, It extends tam Laicis quam Clericis. There is no other Writ but this, and if this go not to a Layman, then there is no Writ to a Layman. Its true, all Writs in the Register are Clericis; but that's but an Addition. The ground of the Writ is, That a person is going beyond Sea to the prejudice of the King; and the Writ is to give Security not to go till the King licence him, Leigh against Bever, 9 Jac. A President 9 Car. 1. Meads Case, a Ne exeat Regnum awarded for a private matter. Hill. 52. Boyl against Slugborough, It was a Question, Whether this Writ was grantable at the Suit of a private person.

No *Exeat Regnum* lies for a private matter without a Bill.

But the Court resolved this Writ well lies in the principal Case, and will not supersede it.

The

The Lord Keeper.
Chief Baron Hales.
Juſtice Archer.

Dame Margaret Pridgeon, *Relict of Sir* Francis Pridgeon, *againſt the Executors of Sir* Francis Pridgeon *in Truſt for* Robert Pridgeon, *&c.*

After ſeveral Debates on both ſides before the Lord Keeper, This Cauſe came to be further heard by him in November 1668. aſſiſted with the Lord Chief Baron Hales, and Judge Archer. And the Caſe was thus:

The Plaintiff being a Widow at her Marriage with Sir Francis Pridgeon, ſuggeſts an Agreement precedent to the marriage between him and her, and others on her behalf, That notwithſtanding her Marriage the Rents and Profits of all her own Eſtate, and what perſonal Eſtate and Goods ſhe had, ſhould be at her own diſpoſe; and that ſhe was poſſeſſed of certain Goods, &c. before her Marriage with him, which the Defendants, the Executors of Sir Francis, claimed, as being his Executors in Truſt for the ſaid Defendant Robert his Nephew and Heir, which by the ſaid Agreement ſhe claimed.

Agreement between Husband and Wife before Marriage extinguiſhed by Marriage.

For the Defendants it was inſiſted, that if any ſuch Agreement were with Sir Francis before the Marriage, it was extinguiſhed by the Marriage, and ſo cited Smith and Staffords Caſe, Hob. 216. and the Earl of Suffolk and Greenvils Caſe; and inſiſted ſuch like Agreement ought not to be countenanced in Equity, being derogatory to the Rights and Priviledges of Marriage. And on the debating the matter of this Cauſe a Caſe between Scot and Brograve about 1639. in this Court, was cited, which was thus.

This Caſe of the Earl of *Suffolk* was in the Commiſſioners time. *Scot* againſt *Brograve* about 1639.

The Wife of an improvident Husband had unknown to him by her Frugality raiſed ſome Monies for the good of their Children, which ſhe had diſpoſed for that purpoſe, being otherwiſe unprovided for, and this diſpoſition of the Wife the Lord Coventry had eſtabliſhed by Decree. But afterwards upon a Review and Aſſiſtance of the Judges this

The Wife may not be ſuffered, though to good Uſes, to diſpoſe of any Mony ſhe hath raiſed out of her Husbands Eſtate by Frugality.

this Decrée was reverſed, as being dangerous to give a Feme power to diſpoſe of her Husbands Eſtate. And another Caſe betwæn Gorges and Chancy, which was about Michaelmas Term 1639. was cited, which was to this effect.

Gorge againſt *Chancy*, *Mich.* 1639.

Baron and Feme by Agrément ſeparated and lived apart, and agreed that the Wife ſhould have 150 l. per annum ſeparate Maintenance, out of which ſhe had ſaved ſome Mony and put it out to Intereſt, and took Bonds in a Friends Name, and diſpoſed the Mony by Will, and this upon Debate was eſtabliſhed a good diſpoſition; and this was now declared to be a juſt Order.

A diſpoſition by Feme Covert of Monies raiſed out of ſeparate Maintenance good againſt the Husband.

But note, That in this Caſe it was an Agrément after Marriage with Friends in the behalf of the Wife for a ſeparate Maintenance: But in the principal Caſe the Chief Baron declared, That though where an Agrément is betwæn Baron and Feme before Marriage, that the Wife may by Will diſpoſe of part of her Eſtate, or for a thing which is future to the Marriage, ſuch an Agrément is not diſſolved by the Marriage; yet where an Agrément is to have Execution during the Coverture, as in the principal Caſe, there the Marriage extinguiſheth ſuch an Agrément. And the whole Court concluded the Plaintiff had no ground for Relief, and declared ſhe had no Cauſe of Suit but by way of anticipation; for the Executors did not claim the Goods, but ſhe feared the other Defendant the Infant, for whom they were Executors in Truſt, would claim the Goods, &c. Yet the Court declared, that they would farther conſider of the matter, and the Cauſe hath not yet received any farther Hearing.

DE

Term. Sanct. Hill.

Anno Regis 20 & 21 Car. II.

IN

CANCELLARIA.

The Lord Keeper.

Goddard *againſt* Complin. January 27.

A Tenant in Tail demiſeth his Lands for ninety nine years by way of Mortgage, and after marries, and in conſideration thereof, and of 500 l. Portion ſuffers a Recovery to enable him to ſettle a Jointure; and afterwards takes up more Mony of the Mortgage upon the former Security. The Jointreſs was Plaintiff, and the Queſtion was, Whether the Defendant ſhould be allowed Mony lent after the Recovery and Marriage.

Where a Mortgagee lent new Mony on his old Security without notice of an intervening ſettlement, ſhall be allowed it.

And the Court declared, that if the Defendant had no notice of the Jointure when he lent the new Mony, he muſt be allowed it.

Another Queſtion was, Whether the Defendant had proved payment of the Mony ſuppoſed to be lent; and as to that there was the Receipt in the Deed of Mortgage, the Condition of Redemption on repayment of the Mony and the Defendants Oath that he had paid it, which was inſiſted

What is good proof of payment of Mony againſt a Purchaſor.

inſiſted on, was Evidence enough of payment after ten years againſt any Perſon, and ſo the Court inclined.

But the Plaintiff ſtanding upon it, that it was not ſufficient Evidence as againſt the Plaintiff, who claimed as a Jointreſs, there was farther Evidence.

A Recovery ſubſequent to a collateral purpoſe ſhall enure to make good precedent Eſtates.

There was alſo this Queſtion put, Tenant in Tail mortgageth for years, and afterwards upon Marriage in conſideration thereof ſuffers a Recovery to ſettle a Jointure, &c. Whether this Recovery ſhould enure to make good the Mortgage, it being deſigned for the Marriage Settlement only. Which was anſwered, If no Recovery had been, there could have been no Jointure. And the Jointreſs could not have avoided the Mortgage. And ſhe is in by the Act of her Husband; and no ſubſequent Act of the Husband could avoid his own Act precedent. And it was alſo declared, That if Tenant in Tail confeſs a Judgment, &c. and ſuffer a Recovery to any collateral purpoſe, that Recovery ſhall enure to make good all his precedent Acts and Incumbrances.

The Maſter of the Rolls.

Collet *againſt* Jaques. February 8.

A Rent and Arrears of it decreed (the Deed being loſt) becauſe it did not appear what kind of Rent it was.

THE Bill was for 3 l. for a Rent of 5 s. per annum Arrear for twelve years. The Plaintiff ſuggeſted that the Deeds by which the Rent was created, were loſt, and alſo the Rent for the future, and there was proof of a conſtant payment of it till the laſt twelve years. And the Maſter of the Rolls decreed the Defendant to pay the Arrears and growing Rent, becauſe he ſaid it was uncertain what kind of Rent it was, and ſo no Remedy at Law; and here the Perſon is made liable for the Rent, which for ought appeared he was not at Law.

The

The Maſter of the Rolls.

Duncumban *an Infant againſt* Stint *Executor of* Stint. February 1.

THE Defendants Teſtator gave the Plaintiff 1000 l. to be paid at the Age of twenty one years.

An Executor decreed to give Security for a Legacy.

The Bill ſuggeſted the Defendant waſted the Eſtate, and prayed he might have his Security to pay this Legacy when due; and the Maſter of the Rolls did accordingly decree the Defendant to give Security.

The Maſter of the Rolls.

Eaton Colledge *againſt* Beauchamp *and* Riggs. February 5.

THere was a Rent or Penſion of 1 l. 14 s. per annum granted by King H. 6. to that Colledge, iſſuing out of Lands. Riggs was Executor of the Ter-tenant, and to be relieved for the Arrears of the Rent incurred in his Teſtatrix life-time, was this Bill brought, which did ſuggeſt that the Colledge did not know the Lands out of which the Rent went, and ſo would not diſtrain. Beauchamp was the preſent Ter-tenant, and tho the Perſon of the Ter-tenant was not chargeable with the Rent at Law, but only the Land by way of Diſtreſs; yet forasmuch as the Teſtatrix held the Land, and did not pay the Rent, it was ſaid, that thereby the Perſonal Eſtate of the Teſtatrix was augmented. And ſo the Maſter of the Rolls decreed the Executor to pay the Arrears as far as he had Aſſets of the Teſtators Eſtate.

An Executor decreed to pay Arrears of Rent which the Teſtators Perſon was not liable to

The Lord Keeper.
Justice Tirrel.
Justice Moreton.

Slingsby *against* Hale. February 14.

On a Demurrer.

THE Bill was, A Bill of Rediew to reverse a Decree made about twenty years since, wherein the Mortgagor being Plaintiff against the Mortgagee to have a Redemption, it was decreed accordingly, paying the Mony to be found due on Account; and for that purpose referred to a Master to take the Account. And it was also decreed, that if the Plaintiff failed to pay the Mony at a day to be set by the Master, the Defendant should hold discharged of all Equity of Redemption.

Pending the Reference the Suit abated by the death of one of the Parties Defendant, yet the Account went on without any notice taken to the Court of the Abatement; that the Executor being a Defendant to the Original Bill, the Master was attended on the behalf of both sides, and made up his Report, and that confirmed and decreed, and that Decree inrolled near twenty years since. And now the Plaintiff being Devisee of the Mortgagor, by Bill of Review assigns these Errors, and now excepts against the Decree.

First, For that in respect of the Abatement, there was no Cause in Court when the Account was stated, and the Decree drawn up and inrolled.

Secondly. That it was Error for the Court to make a Decree for the Defendant to hold free of Equity of Redemption on the Plaintiffs Bill.

Proceedings after an Abatement decreed and inrolled, no Error or cause of Reversal.

The Demurrer was in nullo Erratum, and the Plaintiff not intituled to a Bill of Review.

To the first it was answered it was only an Exception in point of Form, and not in point of Right; and that the Account being stated and settled ought not after such length of time to be let lose or ravelled into; and as to this

this Point cited the Case of the Lady Cranbourn and Mr. Dalmahoy.

And as to the second it was said that Circuity of Action is to be avoided, and that there were many Presidents of Decrees in this manner for the Defendant, and that what was decreed for the Defendant was most just, and could not be denied upon the account of Justice.

And the Court declared, they saw no cause to alter the Decree; and so allowed the Demurrer and dismist the Bill.

After a Complaint of this in the Lords House, the matter of the Demurrer was reheard the ninth of March 1670. by the Lord Keeper, Chief Justice Hale and Vaughan. And on long debate they seemed to incline against the Plaintiff; but took time to consider. And after 21 July 1671. they all three delivered one uniform Opinion clearly, That the Plaintiff being Devisee is not intituled to a Bill of Review, being not in privity to the Testator, against whom the Decree was; as if a Judgment be against Land, and the Owner aliens the Land, the Alienee cannot bring a Writ of Error, nor the Vendor; and so dismist the Bill for this reason principally. Yet the Keeper and Chief Justice Hale were of Opinion that the Error assigned was no sufficient Error to avoid the former Decree; but notwithstanding the Abatement the Account ought to conclude and stand as an Account stated.

A Devisee cannot maintain a Bill of Review because he is not in privity.

Justice Wyld.

Weymberg *against* Tough. February 24.

On a Demurrer.

THE Bill was to be relieved against an Action of Debt for Mony due to the Defendant as a Merchant, from the Plaintiff, for Wares sold in Denmark. The Equity was, That in the time of Hostility between that Crown and this, the Defendant being a Subject to this Crown, the Plaintiff was forced to pay the Mony he owed the Defendant to Commissioners authorized in that behalf to the King of Denmark; and that by the Articles of Peace between the two Crowns, it was agreed, That all Monies

Where Articles of Peace between 2 Crowns can discharge a Subjects Debt.

so exacted from each others Subjects should be compensated by setting one against the other, and that the Parties that paid the Mony to either of the Kings Orders should be discharged against the Creditor.

To this Bill the Defendant demurred, and insisted there was no Equity, and that if the Articles did bind private Persons, they were as good at Law as here; but at Law they did not bind, for the Defendant had a Verdict.

Chancery a Court of State.

For the Plaintiff it was insisted, That the Chancery was a Court of State, and that the Articles of Peace were inrolled there, and that the Bill was to have Witnesses examined beyond Sea. The Judge ordered the Defendant to answer.

The Lord Keeper.

Marah More *against* Nicholas Grice *and others.*

THE Plaintiff Marah's Mother was Sister of the Defendant Grice, and by Articles of Agreement made between Thomas More the Plaintiffs Father and Nicholas Grice the Defendant (in behalf of his Sister the Plaintiffs Mother,) it was agreed, That in consideration of 800 l. agreed to be given with the Plaintiffs Mother in Portion to the Plaintiffs Father (whereof 600 l. was Nicholas's own free Gift,) That the said Nicholas should stand seised in trust of the Lands in question, as a Jointure, for the proper use of the Plaintiffs Mother for and during her natural Life, the Remainder to the Issue of her Body (which the Plaintiff only is) the Remainder to the right Heirs of Thomas More. These Lands were in truth mortgaged by More before, and the Defendant did pay him 500 l. of the Portion, and was wrought upon by him to deliver up the Articles, and for 5 l. to release to More the Lands, and More and his Wife had by Deed and Fine sold the Lands away; and so to be relieved against the Breach of Trust was the intent of the Bill.

And for the Plaintiff it was insisted, that the Defendant ought to make good to the Plaintiff the value of the Lands ever since her Mothers death, who died about 20 years since, and the full value of the Lands, if to be sold (by the Agreement the Lands being to come to her immediately after her Mothers death.)

But

But for the Defendant it was inſiſted, That if there were a Breach of Truſt, it was no ill intent in him, nor any thing to his benefit, but to comply with the neceſſity of the Plaintiffs Father (who is ſtill living,) and if a Settlement had been made according to the Articles, it might have been ſo awarded, that he and his Wife might have prevented the Eſtate from coming to the Plaintiff. And they did after ſell the Lands by a Fine; and however the Plaintiffs Father, according to the true meaning of the Articles, was to have had at leaſt an Eſtate for Life in the Lands: For it was abſurd to think, that the Husband in Marriage ſhould ſettle his Lands on his Wife and her Iſſue, and exclude himſelf for life; and being mentioned in the Articles, that the Wife ſhould have them for a Jointure, and after to her Iſſue, The very word Jointure did imply that the Husband ſhould have an Eſtate for his life as well as the Wife, and that was the uſual way of ſettling Jointures for life on the Husband, and then in Remainder to the Wife for life. And it was ſaid, That if a Bill had been brought againſt More to compel him to make a Settlement according to the Articles, the Court would never have excluded him of an Eſtate for his own life. And of this Opinion the Lord Keeper declared he was as to the Husbands Eſtate for life, and that he ought to have the Premiſes by intention of Agreement for life. And therefore, and inaſmuch as 600 l. of this Portion was agreed to be given by the Defendant as a free Gift of his own, and it was uncertain what the value of the Lands might be after the Plaintiffs Fathers death, and there was 300 l. of the 800 l. unpaid, the Lord Keeper propoſed, that the Plaintiff ſhould have the ſaid 300 l. with Damages, and the Defendant to pay it her accordingly. And ſo it was decreed.

The word (*Jointure*) in an Agreement, implies, that the Husband ſhall have an Eſtate for Life as well as the Wife.

DE
Termino Paſchæ
Anno Regis 21 Car. II.
IN
CANCELLARIA.

Hele *againſt* Stowel. May 8.

THE Husband deviſed his Lands to his Wife during the Minority of his Son, and dies, and hath only a Poſthumus Son, and by his Will gives his Wife power to make Leaſes to raiſe Mony to pay Debts, &c. The Wife enters and takes the Profits, and then marries a ſecond Husband, and he lives ſome years, and takes the Profits, and dies, and the Wife continues to take the Profits of ſuch part of the Land as ſhe had not let; for ſhe did let ſome part according to the Will. This Son attains his Age, and proves a Revocation of the Will, and prays his Mother may account.

Where Rents taken by colour of a Title that's avoided, the Receiver ſhall be accountable as a Bailiff.

Ordered that ſhe ſhall account for all the Profits that Perſelf or her Husband took; and the reaſon was, that ſhe ſhould be ſaid to take them till the Infant was 14 years of Age, as Guardian, and after as Bailiff. And ſhe was to anſwer as to what her Husband took; as in a Devaſtavit, the Wife having no notice of the Revocation, had paid Legacies charged on the Lands by Will.

Legacies paid by colour of a Will which is after found to be revoked, allowed.

Ordered that ſhe be allowed thoſe. But as for the Leaſes ſhe had made, tho they were for Fines and full Rents, tho ſhe offered to account for the Fines and Rents, The Court would not make them good, becauſe the Mother could not ſet or let Lands.

The

The Lord Keeper.
Justice Rainsford.
Justice Wyld.

Holstcom *against* Rivers. May 10.

THE Defendant and one Collins were Factors for the Plaintiff in Spain before 1654. In that year they sent him to London on account, and charged themselves with divers Goods of the Plaintiffs in specie. In 1656. there hapned an Imbargo on English Ships and Goods in Spain, and a Seizure of all the Goods in the Defendants and Collins Hands, and on their Books, and the Defendant was cast in Prison on that account, and the Bill was now to call the Defendant to an Account (Collins being dead) without making his Executrix a Party.

For the Defendant it was insisted, That by reason of the Seizure and Imprisonment, he could not account, having lost his Books, and never seen them since, and that the Plaintiff had been twice over with Collins Executrix, and she was no Party, and that after this length of time. it would be hard to draw the Defendant to an Original Account.

Court. It was resolved for Law, That (tho inter Mercatores jus Accrescendi hath no place,) yet the surviving Factor was to account for what was made by himself or Co-Factor; and yet it was agreed, that in this Case an Account lies against the Executrix of the dead Factor. And so it was ordered, That in respect of the length of time since the Account was sent, and no clear proof of any Exception to it till after the Seizure, and that when the Account was sent over the Plaintiff was writ to, to send his Exceptions speedily, if any he had, that the Account should not be ravelled into, but ordered the Defendant to account for, and satisfie what had been made by sale of the Goods remaining in specie in the former Account before the Seizure. But in regard of the length of time, and the loss of the Books (which the Defendant had sworn by his Answer) It was ordered, That the Defendant should not be charged in this Account for more than according to his own Oath what

The surviving Factor is answerable for himself and Co-Factor.

The Executor of the Co-Factor first dying is accountable.

An account rested upon 14 years is conclusive.

Where an Accountant having loſt his Papers by no fault of his own, ſhall not be charged beyond his own Oath.

what was made, or he did remember or believe was made by the ſale of thoſe Goods. And with theſe Directions, it was referred to Merchants to take the account, who made a direction tending to draw a harder direction from the Court upon the Defendant in the way of his accounting. Whereupon his Lordſhip appointed to rehear the Cauſe, and the ſame was accordingly reheard by him, aſſiſted by Mr. Juſtice Rainsford and Mr. Juſtice Wild, and upon long debate the former Order was confirmed.

Prat *againſt* Colt. May 11.

On a Demurrer.

A Truſt of Lands no Aſſets.

THE Plaintiff had a Judgment againſt George Colt, and brought his Bill againſt his Heir, to ſubject certain Lands which he had a Decree of this Court for, upon a Truſt for his Father and his Heirs to ſatisfie his Debt; and the Defendant demurred, and this Demurrer allowed: And the Lord Keeper conceived it all one with Bennet and Box's Caſe. But quære ſince the Statute of Frauds and Perjuries.

DE

DE
Term. Sanct. Trin.
Anno Regis 21 Car. II.
IN
CANCELLARIA.

The Lord Keeper.

Juſtice { Twiſden, Wyld, Rainsford.

Vachel *againſt* Vachel *and* Lemmon. July 1.

THanfield Vachel by his laſt Will in Writting deviſeth to the effect following, (viz.) I give the Uſe of all my ſeveral Paintings and Books of Print, my coloured Collection of Medals in Gold, Silver and Braſs, all my rare Turnings of Ivory and Guyacomb, with my Preſs of Books and Cheſt of Drawers with the Perſpective in it, to my dearly beloved Wife (being the Defendant *Rebecca Vachel*) during the Term of her natural Life: And my Will is, That if ſhe be with Child of a Son, that then after her deceaſe the ſame Paintings, Books of Print, &c. ſhall be left, remain and come to the ſame Son; But if my Wife be not with Child of a Son, or if the ſame Son ſhall die without Iſſue Male of his Body, then my Will is, That all the ſaid Paintings, Books of Print, &c. after the deceaſe of my ſaid Wife, and the death of ſuch

Son as my Wife is now with Child of, ſhall come and remain to the uſe of *Thomas Vachel* (the Father of the Plaintiff) of which my Will is, That the ſaid *Thomas Vachel* ſhall have the uſe only during his Life, and that he leave them to my Kinſman *Thomas Vachel* his Son (the Plaintiff) and that he ſhall as far as in him lies, ſo diſpoſe thereof to him that ſhall by Gods Bleſſing next ſucceed himſelf in my Mannors and Lands in the County of *Berks*, that they remain as an Heir loom, and go and remain to ſuch Perſon and Perſons as ſhall inherit my ſaid Mannors and Lands, who I deſire may prove Lovers of Learning, Ingenuity and Arts, which Clauſe the Defendants inſiſting to be revoked by a Codicil, and the Matter as to that Point having been fully heard, and his Lordſhip having had the Opinion of Civilians therein, did on the firſt of May laſt declare his Judgment to be, That the uſe of the aforeſaid Rarities was well ſetled by the Will of the ſaid Teſtator upon the Plaintiff Thomas Vachel after the death of the ſaid Defendant Rebecca Vachel, and not revoked. But the Defendants Councel then inſiſting, That tho they were admitted to be agreeable to the Civil Law, yet the very Limitation in the Clauſe of the Will of the Rarities to the Plaintiff was void by the Common Law. His Lordſhip for the Defendants farther ſatisfaction, declared he would have the Opinion of the Lords, the Judges therein upon that ſingle Point of the Limitation of the Rarities, whether the ſame were a good or void Limitation. And the Cauſe now ſtanding in the Paper for a determination in that Point, his Lordſhip declared he had adviſed with the Lords the Judges, and now aſſiſted with Mr. Juſtice Rainsford and Mr. Juſtice Wyld, upon deliberate conſideration had of the Clauſe aforeſaid, in the Will, whereby the uſe of the Rarities are deviſed to the Plaintiff after the death of the ſaid Rebecca Vachel; And forasmuch as the ſaid Thomas Vachel the Plaintiffs Father died in the life-time of the ſaid Tanfield, and the Defendant Rebecca being not with Child of a Son, ſo as the Contingencies upon which the Limitation was made never happening, his Lordſhip with the Lords the Judges were all clear of Opinion, that the Deviſe of the ſaid Thomas Vachel was an abſolute Deviſe, and good in Law, and that the Defendant Rebecca Vachel ought only to have the uſe of the ſaid Rarities during her life only, and the Plaintiff is to have the ſame after her death according to the ſaid Will, and doth order and decree the ſame accordingly, and that the Defendant

A Limitation of perſonal Chattels to one during Life, Remainder to another, good.

Defendant be examined upon Interrogatories for the discovery of the particulars of the Rarities and Matters so devised, and that an Inventory of the said Rarities be made according to the said Order of the first of May. And as touching Security now prayed by the Plaintiffs Councel, and other Matters for final compleating this Decree, the Court declared, that the same was not the proper Business of this day, and they would not now determine the Matter, but leave the Plaintiff to move this Court therein, and then such farther Order shall be made as shall be just.

The Lord Keeper.
Justice Twisden, Rainsford, Wyld.

Wood *against* Sanders, *or* Sanders *against* Wood.
July 1.

A Long Term of years was assigned upon a Trust to permit the Father to receive the Profits for sixty years if he live so long; and after his death to permit the Mother, his Wife, to receive the Profits for sixty years, if she so long live; and after the death of the Father and Mother to permit John the Son his Executor, &c. in case he survive his Father and Mother, to receive the Rent, &c. And that the Trustees at the request of John after the death of his Father and Mother should assign to him, his Executors, &c. But if John die in the life-time of his Father and Mother, and leave Issue, which shall be living at the death of his Father and Mother, then the Trustees to assign the Premises to such Son of John which shall be his eldest Son at that time, &c. but if John die without Issue before any such Assignment, that then the Trustees shall permit Edward another Son of the said Father and Mother, and the Heirs of his Body, and in default of such Issue Nicholas a third Son of the same Father and Mother, and the Heirs of his Body, and for default of such Issue the Executors, &c. of Nicholas to receive the Profits of the Premises during the Term, to their own Uses: John dies Intestate in the life of

his Father and Mother, and without Iſſue, and before any Aſſignment the Father and Mother die; Edward the Son enters and receives the Profits, and dies Inteſtate without Iſſue; Elizabeth his Wife takes Adminiſtration, enters and receives the Profits; Nicholas the third Son takes Adminiſtration to John his Brother, and procures the Truſtees to aſſign to him.

The Queſtion was, Who hath the right to this Leaſe, whether Nicholas the Adminiſtrator of John (who died in his Fathers life) or the Adminiſtrator of Edward, who enjoyed during life, or Nicholas the third Son in his own right?

Where the Truſt of a Term is to one for life, the Remainder for Life, the Remainder to a third Perſon (if if he outlive the Tenant for Life) the Remainder to another and his Heirs, that the Remainder to the third Perſon (he dying before Tenant for life) does not veſt it in his Executors.

It was unanimouſly reſolved, That where the Truſt of a Term is to one for Life, the Remainder for Life, the Remainder to a third Perſon for the whole Term (if he out live the Tenants for Life) the Remainder to another as Heir to Edward the Son, and the Heirs of his Body, that the Remainder to the third Perſon, viz. John, being meerly contingent, was not ſo veſted in him as that his Executors could have it, he dying before his Father and Mother, and that the contingency not happning, he dying in the life of Tenant for Life, the Remainder over to Nicholas was well limitted after ſuch a contingent Remainder. Vide as to this Point the Caſe of the Duke of Norfolk.

DE
Term. Sanct. Mich.
Anno Regis 21 Car. II.
IN
CANCELLARIA.

The Lord Keeper.

Smith *againſt* Palmer. October 25.

UPON a difference between the Plaintiff and one John Browning, an Award was made that Browning ſhould pay the Plaintiff 5 l. in hand and 23 l. at ſeveral days, and for that purpoſe Browning to enter into a Bond of 50 l. penalty. This Bond was taken in the Name of Brown. Browning exhibits his Bill againſt Smith, and Brown ſuggeſting a Fraud in obtaining the ſaid Bond, and that the ſame was in Truſt for Smith. Smith and Brown joyn in an Anſwer to that Bill, and there Smith ſwears that he was indebted to Brown more than 23 l. and that Browning being awarded to pay him that 23 l. Brown did accept of that Bond for ſo much of what Smith owed Brown, and ſo ſaid it was not upon any Truſt for Smith, but taken to Browns own uſe, Brown being dead and the Defendant his Executor. The Plaintiff Smith by his now Bill ſeeks to have the Bond out of Browns Executors hands, and chargeth his Name to have been uſed in Truſt for the Plaintiff.

The

The Defendant pleads the former Answer in the other Cause, and that thereby the now Plaintiff had denied any Trusts in Brown for him, and swore the Bond was taken in Brown's Name for his own use, prout.

The Plaintiff replyed, that Brown was his Solicitor in the other Cause, and that he answered by his advice, and that he advised it was fit to answer to them, and for that purpose advised the now Plaintiff, before he put in that Answer, to enter into a Bond to Brown for more Mony that so he might swear as he did in that Answer, which Bond he promised Smith to deliver back when he had put in his Answer, and did so, and averred he was at the whole Charge in defending the Suit, and that Brown after that Answer owned the Trust in that Bond of 23 l. for the Plaintiff, and there was proof of that.

A Trust decreed for a person who in his Answer on Oath in another Cause had denyed the Trust because drawn in to answer so by Fraud.

And upon the hearing of this Cause it was taken to be a Fraud in Brown to draw the Plaintiff in to put in such an Answer upon Oath in the other Cause, that the Bond was in Trust for him: And the Defendant was decreed to deliver up the Bond to the Plaintiff with a Letter of Attorny to put it in Suit.

At the Rolls. *The Master of the* Rolls.

Richard West *Clerk*, *and divers others the Churchwardens and Overseers of the Poor of* Great Creaton, *against* Knight *and his Wife, Executrix of* John Palmer. October 27.

JOHN Palmer had by Will given 50 l. to the Parish of Great Creaton, where he was born (without saying to what use) The Minister, Churchwardens and Overseers for the Poor exhibited this Bill for the 50 l suggesting that he intended it for the benefit of the Poor.

The Defendant the Executrix confessed the Devise, and offered, if she were bound to pay it, to assign some Security for Mony owing to the Testator to satisfie it.

10 May 1669. This Cause was first heard by the Master of the Rolls: And it being then insisted by the Defendants Counsel, that the Devise was void, and that the Parish being no Corporation could not sue for it by Original

ginal Bill, and that it was a void Devise for that there was no Use limited touching the 50 l. whether it were for the Poor, or for Repair of the Church, or Highways, &c. And it was stood upon that if the Plaintiffs had any ground of Relief, it must be by Commission of charitable Uses, and not by Bill. The Master of the Rolls ordered Presidents to be produced before he would deliver his Opinion.

And now at this day upon farther hearing of the Cause, a Decree of this Court 30 June 1657. was produced, St. Johns College against Plat, where upon the advice of four Judges, it was resolved, that upon an Original Bill the Chancery might relieve within the Statute of Charitable Uses, and therefore and inasmuch as the 50 l. was the personal Legacy, and no Devise of Lands decreed, that the 50 l. be paid as far as the Defendants have Assets of their Testator, and directed it to an Account to see what Assets, and the Master to whom it was referred to see the Mony disposed for the benefit of the Poor of the Parish.

Relief given by Bill on the Statute of Charitable Uses.

Mony given to a Parish generally without saying to what use, decreed to the Poor of the Parish.

The Lord Keeper.
Justice Windham.
Baron Turner.

Nelthrop *and* Margaret *his Wife against* Hill, Biscoe *and* Ann *his Wife.* October 6.

THIS Cause was heard first before the Lord Keeper.

The Case. The Plaintiff Margaret and the Defendant Ann were the two Daughters of Smith, who having made his Will eighteen years since, and Hill Executor and Curator of the Children (both then in Infancy) by his Will gave several Legacies, and then gave the residue of his personal Estate to be equally divided betwen his two Daughters, Ann and Margaret; and if both die before Marriage or full age, then he deviseth it over to another. Biscoe marrieth Ann the eldest Sister, and then one Moiety of the Estate, which was good, and in the hands of the Executor, is paid to Biscoe and his Wife, and

Biscoe

Biſcoe ſettles a Joynture for this on his Wife, and gives the Executor a diſcharge.

Afterwards the Executor puts out the other Moiety (Margaret being ſtill in Minority) on Security, and part of it is loſt. Then Margaret marries Nelthrop, and they bring this Bill againſt the Executor, and Biſcoe and his Wife to have a Contribution towards the loſs born by them, and to have Biſcoe refund.

Upon the firſt hearing it was ſo decreed unleſs Biſcoe ſhewed Preſidents to the contrary.

Now upon farther hearing this day (viz.) 10 Jan. 1669. before the Lord Keeper, Mr. Juſtice Wild, and Mr. Baron Turner, It was for Biſcoe inſiſted, That by the Marriage of Ann, her moiety became due, and the Deviſe over is defeated; ſo that if Biſcoe and his Wife had brought their Bill for it, the Executor could not have denyed payment of it, and ſo Biſcoe hath done no fault, who hath not his Mony till due, and he is not concerned to look any farther; and in lieu of the Portion a Joynture is made, and a Releaſe for the Legacy is given; and probably if the Executor would not have paid, Ann might have loſt her preferment, and the Executor was by the Will the Curator of the Children. And it was ſaid, that by Anns Marriage firſt ſhe became firſt intituled. And it was inſiſted that where Legacies are payable at ſeveral times, and the Legacy that is firſt due is paid when due, and there is Mony in the Executors hands to pay the other Legacies, that if a loſs fall on that afterwards, there is Equity in that Caſe to put the firſt paid Legatæ to refund.

For the Plaintiff it was inſiſted, That there was in this Caſe no time limited for payment of either; and that by the Marriage of Ann the Deviſe over being defeated, both became due and payable, the Deviſe being indefinite without any expreſs time of payment: And the Plaintiff Margarets Infancy ought not to turn to her Prejudice; and that it was the Teſtators intention that they ſhould have it equally, one as much as the other. And if Biſcoe had ſued, the Executor might have required Security to refund.

Where a Legatee ſhall refund for want of Aſſets.

And it was ſaid and admitted by the Court, That if Executors pay out the Aſſets in Legacies, and afterwards Debts appear, and they be forced to pay them, of which they had no notice before the Legacies paid, That the

the Executors by a Bill here might force the Legatées to refund.

But as to that it was answered, That Case was not like to this; for there was not enough to pay all when the Legacies were paid: But here was enough when the Legacies were paid, to pay all, and the loss since.

And for the Plaintiff it was farther insisted, That a division could not be made without the Plaintiff Margaret called to it; and the Case of Grove and Banson insisted on, where Banson had a Conveyance and Statute for his Wifes Legacy, and yet put to refund.

But as to that Case it was answered, There was not any Payment, but a Security, and by that he would have had a Redemption; so this payment was not paid, but executory. And the Plaintiff cited the Case of Picks and Vincner upon Sir Henry Martins Certificate, which was the 29th of October, 1639. and was in substance thus, That an Executor may not pay one if he hath not enough to pay all. And an Executor is not bound to pay a Legacy without Security to refund, if there be want of Assets to pay either Debts or Legacies, which was not, as is said, to this purpose, there being at the time when this Legacy was paid, enough to pay all.

Picks against *Vincner* 29 Oct. 1639.

Executor not bound to pay a Legacy without Security to refund.

Ordered the Cause be set down to be re-heard originally as well against the Executor as the Legatæ Biscoe and his Wife.

Quære. If there be not a difference betwæn Debts and Legacies thus; Debts may appear to the Executors, but Legacies appear in the Will. And Quære, if therefore Executors be not bound more strictly to take Securities against Legacies that do appear, than Debts that do not.

The Maſter of the Rolls. *Firſt Hearing.*

2. Lev. 21. 1 Vent. 199. 1. Mod. 86. 300. Raym. 236. 2 Rep. 756 787.

Charles Fry *Gent. and the Lady* Ann *his Wife, and* Mountjoy Fry *an Infant, by their Guardian, againſt* George Porter *an Infant, by* George Porter *his Uncle and Guardian.* October 13.

MOuntjoy Earl of Newport had two Daughters, Iſabella, who by his conſent married Nicholas Earl of Banbury (whoſe Daughter the Plaintiff the Lady Ann is,) and Ann, who without her Fathers conſent married Thomas Porter Eſquire, by whom ſhe had George the Defendant the Infant.

The Earl of Newport being ſeized of Newport-Houſe in Fee, by his Will in Writing deviſeth in theſe Words:

Item, I give and bequeath unto the Lady *Ann* Counteſs of *Newport*, my dear Wife, all that my Houſe called *Newport-Houſe*, and all other my Tenements in the County of *Middleſex*, for her Life, and from and after the death of my ſaid Wife, I do give my ſaid Houſe and all other my Tenements in *Middleſex* unto my Grandchild the Lady *Ann Knowls*, the Daughter of *Nicholas* Earl of *Banbury*, by the Lady *Iſabella*, my late Daughter, and the Heirs of her Body to be begotten. Provided always and upon Condition, That my ſaid Grandchild the Lady *Ann Knowls* do marry with the Conſent of my ſaid Wife, and of *Charles* Earl of *Warwick*, and of *Edward* Earl of *Mancheſter*, or the major part of them. And in caſe the Lady *Ann Knowls* do and ſhall marry without the Conſent of my ſaid Wife, or the major part of my Truſtees aforeſaid, or ſhall happen to depart this Life without any Iſſue of her Body, then I will and bequeath all my ſaid Premiſſes unto my Grandchild *George Porter*, Son of my deceaſed Daughter, the Lady *Ann*, late Wife of *Thomas Porter* Eſquire, and to his Heirs for ever.

The Plaintiff Fry after the death of the Lord Newport ſtole away the Plaintiff, the Lady Ann, in the night from Newport-Houſe (where ſhe lived with her Grandmother) over the Garden Wall, and ſo ſoon as ſhe was miſſ

miſt by her Grandmother, and ſhe was informed of this fact, ſhe ſent to the Earls of Warwick and Mancheſter to inform them of it, who both proteſted againſt the Marriage as unfitting for the young Lady, who was at that time about fourteen years of age, and declared their utter diſlike of it. Afterwards theſe two Earls being examined for the Plaintiffs as Witneſſes in the Cauſe, ſay, That they do aſſent to the Marriage, and that they do not know but that if their Conſents had been asked for before the Marriage, ſuch reaſon might have been given as they might have conſented to it. And they and other Witneſſes ſpeak as to the Earl of Newports intent and frequent Declarations, that the Plaintiff the Lady Ann ſhould have Newport-Houſe, which the Plaintiffs Counſel would lay weight upon to interpret the meaning of the Will to be in terrorem only, and not to defeat the Deviſe to the Lady Ann.

The Bill was to be relieved againſt the Condition and the Breach of it.

And for the Plaintiffs on the firſt Hearing, which was before the Maſter of the Rolls only (in the Lord Keepers abſence) It was inſiſted on by Serjeant Fountain, that there were three things in Equity upon which the Plaintiff ought to be relieved againſt this penalty.

1ſt. That there was no other reaſon for this Condition and Penalty but to prevent the Ladys Marriage without Conſent, and therefore it was to be expounded in terrorem only.

2dly. That this young Lady was but fourteen years old, and knew nothing before her Marriage of the Condition.

3dly. As ſhe was in her Infancy and knew nothing before her Marriage of the Condition, ſo ſoon after as ſhe did know it, ſhe did go to the two Earls (her Grandmother being dead) and they did approve of the Marriage.

For the Defendant it was inſiſted, that the Infancy or want of notice to her of the Condition was of no weight, for that there was not by the Will any Proviſion made or any directions given to give her notice, but as ſhe takes by the Will as a Purchaſer, ſo ſhe muſt take it ſubject to ſuch Condition as the Will hath ſubjected it to, and is to take notice at her peril, and an Infant may break a Condition; and this act of hers in marrying was but what the Earl had reaſon to expect ſhe would do before

she came to the Age of one and twenty years, it not being usual for Ladies of her Quality to stay till one and twenty before they marry. And as to the pretence that this Condition was in terrorem, It was said, That it was a Limitation, and that it was by the Will limited over to the Defendant in case of the Lady Anns Marriage without Consent, pari passu to her dying without Issue. And though the Civil Law may construe the Limitation in a personalty over in such Cases as this to be void and to be but in terrorem, yet in this Court in the Case of Inheritances, as this is, nay even in the Case of Personalty where it was limited over as here, this Court hath not at any time avoyded such Limitation over; The constant difference taken in this Court being betwixt a Condition to make the Devise void without limiting it over to another, and the limiting it over to another: In the first of which Cases the Court hath usually construed the Condition to be in terrorem only, because there is no other person appointed to take, as in the Case of Sir Henry Bellasis now cited (which you may see before fol. 22.) But where it hath been limited over it hath been always taken otherwise: As in the Case of Davis against Halton, November 1664. the matter here being 1000 l. part of what was given to the party who broke the Condition; and so though it were for a personalty, the Limitation over is good.

Where the Legacy on Condition the Legatee marry with consent is recoverable in Equity, notwithstanding the breach of the Condition, and where not.

The Master of the Rolls. There is no difference in this Case whether it be a Condition or a Limitation, for the Penalty is the same in both: And this must be understood to be in terrorem; and the Infant had no notice of the Condition, and so decreed against the Defendant. And that the Plaintiff, the Lady and the Heirs of her Body should hold and enjoy against him.

Appeal. Lord Keeper. Chief Justice *Keeling*. Chief Justice *Vaughan*. Chief Baron *Hales*.

The Defendant appealed from this Order by a Petition, and prayed the Entry thereof might be stayed, and it was so, and ordered to be re-heard by the Lord Keeper, assisted with the Lord Chief Justice Keeling, Chief Justice Vaughan, and Chief Baron Hales, 22 April, 1670. At which Hearing it was insisted by Serjeant Fountain for the Plaintiff that this was a Penalty in terrorem that the Daughter might not rashly marry, but she was then an Infant without notice of it, and the Earls do approve the Marriage.

Serjeant

Serjeant Maynard for the Defendant. Its a Limitation, not a Condition: A Will would not pass Lands by the Common Law; its by the Statute, and that says the Will shall stand. And for Notice, the Law requires no Notice to be given, nor did the Earl the Devisor require any: And who should give Notice? The Defendant is an Infant, and could we give notice? Mente Testatum ratum est.

Mr. Solicitor Finch for the Defendant. There can be no Decree, for the subsequent approbation works nothing, and was extorted by Compulsion. For when the Earls were first acquainted with the Marriage, they disallowed it, and the Estate divested out of the Lady by the Marriage without Consent, and the subsequent Assent cannot revest it. The primary intention was in terrorem to restrain the Lady from an imprudent disposal of her self; but the secondary Intention was, that if she did marry without Consent, she should lose the Lands. The Grandfather could not have settled it stronger than he hath. And that the Grandfather may impose such Condition on his Children is not to be denyed. And if this Court should relieve against it, it is to incourage disobedience in Children to Parents. And this is a Case purely at Law, and the matter of Notice and other Circumstances are all to be considered at Law as well as here, and if not relievable there, its the same here. And if Notice is necessary, as I conceive it is not, that is purely at Law, and possibly it may be found at one Tryal, that there was not Notice, and at another it may be found there was Notice; and it being matter of Inheritance and Freehold, the Defendant ought to be at liberty to try it toties quoties.

Subsequent Assent will not supply the want of Consent precedent.

Serjeant Fountain. A Limitation may be at Law, and yet relievable here: As if the Condition be to have the Consent in writing, and the Consent is had without writing, this Court will help in that Case. And he doubted whether a Father can so provide or limit an Estate, as that a Court of Equity shall have no power over it, for it cannot be so provided by agreement of Parties in Case of a Mortgage, that this Court shall not give Relief; and Equity is part of the Law of England: And there are Emergencies and Cases which a Man cannot provide for; as suppose the Plaintiffs had sent to the Parties for their Consent, and the Messenger never went, but said he did, and had their Consent, and upon this she had married, she should

A Condition may not be performed in all circumstances and yet be relieved here.

Agreement of Parties cannot prevent a Court of Equity in its Jurisdiction.

Equity regards the Substance and not the Ceremony.

should certainly be helpt in Equity. And the end of the Will is performed, she was to marry such person as the Earls should like of, and they have approved, and so the substance is performed; and whether it be a Limitation or Condition is equally penal; and a Limitation over of personal Legacies is void by the Civil Law, I grant; but that in some Cases of a Limitation over there may be Equity it clearly follows in this upon the circumstances of Infancy, and not Notice and Assent subsequent.

The Court would see Presidents. And then 30 May 1670. upon perusal of all the Presidents, the whole Court agréd in one uniform Opinion to dismiss the Bill, and accordingly it was dismist.

Chief Baron Hales argued thus:

1. It is to be considered whether this be a good Condition or Limitation.

2dly. Whether any Relief be to be given against it.

3dly. Whether upon the Circumstances it is relievable here.

1st. He conceived it a Limitation and Condition both in Law and Equity, because its collateral to the Land; she may marry if she will, but if without Consent, there is a Penalty.

2dly. Its a Condition, because it is to contain the Party in that due Obedience which Law and Nature oblige her; and she should have applyed to her Grandmother for her Consent, though there had bèn no such Condition. And although in the Civil Law in the Case of a meer personalty, the Limitation over be void, yet this is a Devise of the Lands not governed by that Law. Estates governable by the Law of this Kingdom without relation to another form ought not to be influenced by another Law, and this being a good Condition, it cannot be in Law defeated, and there being a full breach of the Condition, as Law will not, Equity cannot help. And as to the Objection if there may not be Relief against breach of Conditions in Equity, there will be a great shatter in Decrées already made; this Case is not like the Case of a Mortgage, where the Condition is for payment of mony; because there if the mony be not paid at the day there, may be a compensation made by payment at another day with Damages.

Estates governable by the Common Law ought not to be influenced by another Law.

3dly. Again,

3dly. Again, this Breach is not relievable in Equity, because it is a voluntary diſpoſition throughout, both in equali gradu as to the Settlement and as to the blood of him that made the Settlement. And it appears by the Will of the Earl of Newport, that made the Settlement, that he did as really intend it ſhould go over for marrying without Conſent, as the Ladys dying without Iſſue. And he reſts much on it that there is no Preſident of any Relief given in this Caſe; for upon view of all the Preſidents he doth not think any of them come to this Caſe; and its not fit to go further than the Court hath gone already, for if they ſhould, there would be no end, and its fit to ſet bounds. And as to what was offered from the Proof, that it was the Earls Intention that the Lady ſhould have Newport-Houſe, and that therefore it was in terrorem; He ſaid that no collateral Averment to expound the Will ought to be admitted, for if there ſhould, there would be no certainty in any Caſe. And as to the Earls approving the Marriage ſince, he ſaid they were charitable therein; and though Equity will favour Infants, yet an Infant may be bound by Law to a performance of a Condition; and inaſmuch as this Condition is annexed to an Act (Marriage) which ſhe as an Infant might do, the Infancy will not help. And as to the point of Notice, I will not determine here, whether Notice be requiſite and neceſſary, for that is at Law, and want of it, if neceſſary, will avail there. I will not ſay what Equity may do in caſe of want of Notice, but that Fact is not ſettled whether Notice or no: It would be hard, becauſe there is not full Notice proved, to conclude here is no Notice, and ſo would have the Bill diſmiſt.

The Breach of a Condition annext to a voluntary diſpoſition, not relievable in Equity.

Tamen quære the two Caſes of *Peyton* and *Shipdam*, and *Cook* and *Tookey* here cited, for Preſidents are otherwiſe.

No collateral Averment to be received to expound a Deviſe of Land.

Whether Notice be neceſſary to be given of a Condition annext to an Eſtate to the perſon to whom the Eſtate is given.

Keeling agreed, and ſaid, 'Tis fit to keep thoſe Bonds which Parents impoſe to hold their Children at Obedience, ſtreight, and not fit for a Court of Equity to relax them.

Vaughan. As to the Conſent ſubſequent, that ſignifies nothing, for a Man cannot be ſaid to conſent to a thing which is not capable of Conſent, as to ſay, a Man conſents that his Heir is of ſuch a colour is nonſenſe, for that is not an object of his Conſent, and after the Marriage their Conſents ſignifie no more in that Caſe.

The Lord Keeper declared he was clear of Opinion, That Equity ought not to interpoſe in this Caſe, and was

was glad to see that a Parent could settle his Estate, that it might be out of a power of a Court of Equity, and so the Bill was dismist.

Note, That upon Tryal and an Argument after this Hearing in the Kings Bench, It was adjudged that Notice was not necessary to be given.

The Presidents cited in this Case were Sir Henry Bellasis, fol. 22. Fleming and Walgrave, fol. 58. Wallis and Crimes, fol. 89. Escot and Escot. 7 Februar. 1653. Coke and Tookey, 24 May, 15 Car. 1. Peyton and Shipdam, Novemb. 1657. The two last Cases were, Whether Relief were given for the breach of a Condition on Non-payment at the day, on a voluntary Devise, there being no Damage but what might be made up by payment after with Damages?

The Lord Keeper.

Davy *against* Davy. December 11.

THE Plaintiff was eldest Son by a second Venter, and the Defendant was eldest Son and Heir by the first Venter; and the Bill was to be relieved for a Rent-Charge of 200 l. per annum of which there was half a year due.

The Bill did suggest, that the Defendant kept not any Stock upon the Ground, but converted it all to Tillage, so that the Plaintiff had not a sufficient distress, and so was without Remedy save in Equity, and prayed a Decree against the Defendant for the Arrears and growing Payments.

The Defendant demurred for that the Lands only being charged with the Rent at Law, there was no Equity to charge the Defendants person.

But this Demurrer was over-ruled, it being laid in the Bill that there was a legal defect in the assurance, which ought to be made good in Equity, the Grant being on a good consideration.

The Defendant answered, and denyed the converting the Premisses always to Tillage, or that the same were not overt to a distress; but said there had been divers times a Stock worth 250 l. upon them.

After

After Proofs published in the Cause it was heard before the Lord Keeper, 20 Novemb. 1667. And the only Equity there insisted on for the Complainant was, that the Defendant imployed all the Lands to Tillage, so that the Plaintiff could not distrain, there being no Cattle kept on the Premisses. But the Defendant did insist, that he did keep a Stock of Cattle thereon sometimes worth 250 l. at a time, and that the Plaintiff endeavoured to charge the Defendants person with the Rent, which was not lyable at the Law. But the Plaintiffs Counsel replyed, that though possibly he might have remedy at Law, yet it was usual to settle matters of this nature in Chancery.

A Rent which chargeth only the Land, not to be decreed in Equity against the person.

Whereupon and upon reading the Proofs in the Cause, the Court declared, they would be attended with Presidents, where Cases of this nature had bèn relieved, and then would give their Opinion. 8 Novemb. 1668. The Court ordered the Cause to be set down again on the Presidents, which the Plaintiff were to deliver to the Defendant. One President was this, Seymore Boreman and Francis Yeat Plaintiffs against John Yeat Esquire Defendant. The Bill was grounded upon an Agrèement made upon the Marriage of John Yeat the Father of the Plaintiff Francis with Frances his Mother, and a Tripartite Dèed 15 Car. 1. in pursuance thereof, whereby John the Father became seized in Tayl, and after the death of Thomas his Father, covenants to levy a Fine to the intent Elizabeth (Mother of Francis, his second Wife after the death of Thomas and himself) and her Assigns should have during her Life out of the Premisses 150 l. per annum, if John should have Heirs Male of his Body that should so long live; and to the Heirs Males of the Body of John by the said Elizabeth another 150 l. per annum, during the life of the said Elizabeth; and that the Heirs males of the body of John and Elizabeth have 300 l. per annum out of the Premisses, with a Clause of distress; and a Covenant to make further Assurance. A Fine was levied accordingly August 1663. John the Father dyed in the life of Thomas his Father. Elizabeth sold her Right to the 150 l. limited to her self after the death of Thomas to the Plaintiff Boreman, and in October before the Bill Thomas dyed, whereby the Plaintiffs became intituled to the several Rents, the Lands descending to the Defendant as Heir to his Grandfather being eldest Son of John by a former Venter, and he had all the Dèeds,

Bowman or *Boreman* against *Yate*.

20 *Jan.* 1660.

Confusion of Bounds of Lands out of which a Rent-Charge issues, proper matter for Relief in Equity.

and refused to pay the Rents, pretending the Lands were not sufficient, and the Limitation in Law defective; and the Lands lying intermixt with others, and Boundaries confused, the Plaintiffs could not distrain, and so prayed Relief here. And charged also that the Defendants Father agreed that if the Lands were too small in value, or defective in Title, he would make both good. To have that done, and to discover the Buttals and Boundaries, and to have the Rents arrear and growing Rents paid, was the scope of the Bill.

The Defendant by answer insisted, That the Plaintiffs proper Remedy was at Law, and that Boreman had not a good Title, because he had not any Attornment, for ought appeared, or any good Conveyance from Elizabeth, and justified the detainer of the Deeds.

On the first Hearing 25 Jan. 12 Car. 2. Ordered a Commission to go to set out the Lands, and Boreman's Title to be determined on the return of the Commission. The Commissioners certified that they had set out the Lands, the present Rents whereof were but 70 l. per annum, and that the Lands charged were 300 l. per annum; and then the Cause came again to be heard before the Lord Chancellor and the two Chief Justices, 12 Jan. 1660. And as to Boreman's Title as Assignee to Elizabeth by which he claimed the arrears from Thomas Yeat's death, during Elizabeths life, The matter stood upon was, that he did not prove he had paid any Purchase Mony.

A Limitation to Heirs Males taken in Equity as a Limitation to the first Son.

A defective Limitation in point of Law supplyed in Equity.

The Court conceived that was not material, he claiming under Elizabeth, who was intituled by the Marriage Agreement, and so capable of Relief.

And the next Point was as to the other Plaintiffs to 150 l. per Annum during Elizabeths life, and 300 l. after to him and the Heirs males of his Body. Whereupon the Court declared, that though the Limitation of these Rents were defective in Law, so as the Plaintiff could have no Remedy at Law, yet by the true meaning of the Marriage Agreement, the Plaintiff Francis is well described to take the Rent, and both the Plaintiffs well intituled, and ought to have Relief so far forth as the Lands and Rents reserved on the Leases, and the Lands as they shall come out of the Lease, shall be of value to make good the same; and that Boreman ought to be first paid, and decreed the same accordingly, and the Defendant to account for the mesne Profits, &c. And for the future

the

the Rents reſerved and Lands out of which the Rents and Profits are iſſuing at the higheſt yearly Value, not exceeding 300 l. per annum, after the Leaſes expire, ſhould be lyable to the payment of thoſe Rents to the Plaintiff Boreman during Elizabeths life, and after 300 l. per annum to the Plaintiff Francis, according to the true meaning of the Deed.

The difference betwixt the two Caſes was,

Firſt, In the principal Caſe the Rent was well limited to the Plaintiff in point of Law by the name of the firſt Son of the ſecond Venter, and he may diſtrain, and having Seiſin, may bring an Aſſize. But in Boreman's Caſe neither himſelf had any Remedy at Law for want of Attournment, and by reaſon of intermixture with other Lands, nor had the other Plaintiff, by reaſon he was not Heir male to his Father; but that Defendant was by a former Venter, ſo the Limitation not good in Law. And obſerve in Boreman's Caſe the Lands only are made lyable, not the perſon.

Another Preſident delivered by the Plaintiff to the Defendant, was 22 June, 1644. Elizabeth Ferris againſt Newby, where an Annuity being deviſed by Will, and by the ſame Will the ſame Lands deviſed to an half Brother of the Deviſee of the Annuity, this being a Rent Seck without Seizen and no power of diſtreſs, and the Deviſee of the Lands having promiſed to pay it; The Court did decree the Deviſee of the Lands to give Seiſin of the Rent to the Deviſee of the Annuity, which Caſe, as was conceived, was againſt the Plaintiff in the principal Caſe, it being in his power to have Seiſin when he would. And the Court in this Caſe did not decree the Lands to be liable.

Seiſin decreed of a Rent Seck.

And now upon the further hearing of the principal Caſe, the Plaintiffs Counſel did not think fit to inſiſt upon, or ſo much as to mention their Preſidents, but ſtood only upon the defect of a diſtreſs, and that the arrears of the 200 l. per annum, were now 100 l. and the Land but 200 l. per annum.

The Lord Keeper declared on the Debate of the principal Caſe, that unleſs there did appear a fraud to hinder the Plaintiff of his diſtreſs, he could not have Relief here. And that all he could do, was to refer it to a Tryal at Law, whether there was any Fraud to hinder the Plaintiff of his diſtreſs; and accordingly at the Plaintiffs deſire did refer it to a Tryal.

Fraud to hinder a Diſtreſs, where tried.

The Lord Keeper.

Trevor *againſt* Perryor. December 14.

On a Demurrer.

THE Plaintiff was an Executor to an Obligæ, and the Bill was to have an Equity of Redemption, which deſcended to the Heir of the Obligor by his death, made Aſſets in Equity.

To this Bill it was demurred in Bennet and Boxes Caſe; and on debate the Lord Keeper inclined to think it all one with that Caſe.

Whether an Equity of Redemption in the Heir of the Mortgagor be Aſſets in Equity.

But for the Plaintiff it was inſiſted, that that Caſe was an hard Caſe to be eſtabliſhed in a Court of Equity; and that this is a ſtronger Caſe, for here the Lands were once in the Obligor, and never abſolutely put out of him, but conditionally by way of Pledge for Mony. And the Equity of Redemption he had was as conſiderable as the Redemption, which was Aſſets at Law. So the Lord Keeper ordered to anſwer: But ſaved the benefit of the Demurrer to the hearing of the Cauſe.

The Lord Keeper.
Juſtice Wyld.

Huttoft Grove *againſt* Banſon *and his Wife and* Thomas Grove. December 14.

HUttoft, the Plaintiffs Grandfather, poſſeſſed of a great perſonal Eſtate, gave the Plaintiff 5000 l. and 500 l. to his Siſter, Banſons Wife, and made the Defendant Thomas Grove his Executor, who had purchaſed the Manor of Beeren-Hall with part of the Teſtators Mony, and mortgaged it to Perryor, and forfeited it. Upon the Marriage of his Daughter to Banſon he agrees her Portion to be for Legacy, Intereſt, and what more he would give

give her 1000 l. and enters into a Statute to Banſon for the ſame, and then he grants the Equity of Redemption, and the Reverſion (for the Mortgage was but for a long term of years) to Banſon as a farther Security. The Bill was to be admitted to redeem the Mortgage, and to have the Legatees loſe in proportion. And tho Banſon had a Statute and Mortgage prout, whereby it was ſaid his 1000 l. continued no longer a Legacy, but was as much a Debt to him, as if he had lent the Mony, and he took it as ſo much Portion, or elſe he would not have married: Yet the Lord Keeper declared, That in as much as the Legacy was not paid, but only ſecured, he conceived it equitable for each Legatee to loſe in proportion, there not being enough of Thomas Groves Eſtate to pay all, and would not admit Banſon to redeem, but the Plaintiff, for that his was the greater Debt; and ſo ordered that he ſhould redeem, and Banſon ſhould loſe of his Wifes Portion in proportion with the Plaintiff. And in this caſe the Caſe of Pike and Vintner in 1639. by advice of Civilians, was cited, where it was reſolved, That an Executor was not bound to pay a Legacy, but on Security to refund, in caſe there ſhould be a defect of Aſſets, to pay Debts and Legacies. But that, as was ſaid, was not applicable to the principal Caſe, for the Teſtator had left ample Aſſets, but Thomas Grove had waſted them, and was inſolvent.

Legatees to abate in proportion where there is not enough to pay all.

An Executor not bound to pay a Legacy without Security to refund, in caſe of defect of Aſſets. *Vide* the Caſe of *Pick* and *Vintner* more largely in *Grove* and *Benſon*.

The Lord Keeper.

Higgon *and others againſt* Syddal Calamy *and others.* December 15.

On a Plea.

THE Caſe was this. Syddal granted a Rent-charge of 300 l. per annum for 2000 l. to the Plaintiff, and after mortgaged the Premiſes for 1200 l. to Calamy. Then thoſe that have Calamys Intereſt, he being dead, buy in a Judgment precedent to the Grant of the Rent-charge. The Plaintiff exhibits his Bill to diſcover what Eſtates the Defendant claims, and chargeth that Calamy had notice of the Plaintiffs Rent before his Mortgage.

The

A Mortgagee without notice of a precedent Incumbrance buys in an Incumbrance precedent to that, he ſhall not be impeached in Equity, but on payment of all which is due to him on both Eſtates.

The Defendants plead the Mortgage to Calamy, and that afterwards hearing of precedent Incumbrances, they bought in a legal Title precedent to the Plaintiffs, and offer, that if the Plaintiff will pay all due on the Mortgage, and on their new acquired Title, to aſſign all to him. But if he will not, they ſtand upon it they ought not to diſcover what that Eſtate is they have bought in, nor ought their Title to be drawn under examination in Equity. And by way of anſwer denied that to their knowledge or belief Mr. Calamy had any notice of the Kent-charge when he lent the 1200 l. And on debate the Plea was allowed as good.

The Lord Keeper.
Juſtice Wyld.

William Style *by Original Bill againſt* William Martin *and* Elizabeth *his Wife, Relict and Adminiſtratrix of* Richard Boſvile *Eſquire, and* Robert Boſvile, *Son and Heir of the ſaid* Richard, *by Guardian.* December 16.

THE Bill was an Original Bill to ſet aſide a Decree in 1664. obtained by the Defendant on a Bill of Reviver (to which the now Plaintiff is no Party) againſt John Style, Heir of Sir Humphrey Style, and others, as obtained by Fraud. The Caſe was thus;

Sir Humphry Styles's Lady (Mother of the ſaid Richard Boſvile) had by his requeſt mortgaged a Manor of hers for 3000 l. borrowed by Sir Humphry 8 Nov. 8 Car. 1. And Sir Humphry had agreed with his Lady, That if he did not pay off that 3000 l. that then his Lands in Kent ſhould ſtand obliged to pay 1500 l. of the 3000 l. for the eaſe and benefit of the ſaid Lady and her Heirs. And 15 Novemb. 8 Car. 1. he conveyed his Kentiſh Lands to Truſtees, which the Defendants ſay was for that purpoſe, but no ſuch expreſs Truſt. Trin. 1641. The Lady Boſvile being dead, Richard Boſvile her Son and Heir exhibited his Bill againſt Sir Humphry and the Truſtees in the Kentiſh Lands to have the benefit of this Agreement. And in Trin.

Trin. 1642. two Witneſſes were examined to the proof of the Agreement againſt Sir Humphry Style, and that the conveyance of the Kentiſh Lands was on that Truſt. The Wars coming on there was a reſt, and no farther Proceedings till 1663. In 1665. Richard Boſvile, who was a Recuſant, died, his Heir then, and yet an Infant. Michaelmas 1663. Martin & Ux' and the other Defendant, the Infant, brought a Bill of Reviver againſt John Style, the Heir of Sir Humphry, and the Heir of the ſurviving Truſtee. And in 1664. after the Anſwer of John Style, who by Anſwer ſaid he was willing the Plaintiffs in the Bill of Reviver may have their Mony, if he may have the reſt of the Lands, and Replication and farther proof taken and publiſhed, it was decreed, That the Plaintiffs in the Bill of Reviver ſhould hold the Lands againſt John Style and his Heirs, and all claiming under Sir Humphry Style ſince the firſt Bill, until the 1500 l. with Coſts and Intereſt were paid off, of which Bill of Reviver the now Plaintiff had due notice given him, and he might, if he had pleaſed, come in by a Croſs Bill, &c. before the Decree. The now Plaintiff made Title by an Intail of Sir Humphry Style on him in 1638. precedent to the Original Bill, ſo that Title was not bound by the Decree. But that Settlement being in truth revoked in 1643. he made another Title by the Will of Sir Humphry Style in 1658. And for the now Plaintiff it was inſiſted, that there was a Colluſion in getting the Decree, the Defendant John Style admitting it by Anſwer to it on the matter, and the now Plaintiff, who was Ter-tenant, no Party to it: And the Report of the Maſter who had computed the 1500 l. and Intereſt to amount to 3600 l. was confirmed without any defence by John Style. And the Rule for binding Titles pendente lite (which is the Rule of the Practice this day) was the Lord Bacons Rule, and that Rule is, That lis pendens binds, if it be in full Proſecution; but here was above twenty years ceſſation, and the Plaintiff had in that time bought in Incumbrances, and improved the Lands, and the notice given the Plaintiff of the Bill of Reviver was too late, Iſſue being joined ſo that he could not come in. And its ſaid, where Judgment is obtained againſt the Land, and the Ter-tenant is no Party, a Writ of Deceit lies for the Ter-tenant, and ſo in a parity of reaſon this Bill was maintainable for the now Complainant. Spencers Caſe 5th Report was cited. And

it

it was farther said for the Plaintiff, That there was no such Agreement between Sir Humphry Style and his Lady as the Decree was grounded upon.

For the Defendant it was said, That the Plaintiff was stopt to say there was such Agreement by Decree.

A Stranger being bound by a Decree gotten by Fraud, may falsifie it.

Lord Keeper. A Stranger may falsifie at the Common Law, and if the Decree be by Fraud, the Plaintiff may then be admitted to falsifie the Agreement. But it is not form, but the substance of a Decree, that all be bound that come in pendente lite.

All that come in *pendente lite* are bound by a Decree.

But the Defendants Councel insisted, that there was no Fraud; for the main Witnesses which were to the Agreement, were examined in Sir Humphry Styles lifetime. Those which were examined after, were to prove the payment of the 3000 l. the Mortgage Mony, which was paid afterwards; and notice was given to the now Plaintiff before any examination of the Bill of Reviver, and could go no otherwise, unless they would have betrayed the Infant; for if he had gone by Original Bill, they must have lost the Witnesses examined on the first Bill.

Notice given a Stranger of a Bill of Reviver necessary; its improper to make him a Party, not being in privity.

Lord Keeper. The War and Infancy excuses the Laches; and the Witnesses to the main were examined in Sir Humphrys life, and so the pretence of the Plaintiffs improvement, and taking off Incumbrances nothing of that in the Bill, but in the Replication; and so dismist the Bill.

Sherman *against* Withers. December 11.

On a Plea.

Exception in the Statute of Limitation as to Merchants Accounts extends not to Inland Merchants.

THE Plaintiff was an Inland Merchant, and the Defendant his Factor. And the Bill was for an Account of fourteen years standing.

To all, but what was within six years before the Bill, the Defendant pleaded the Statute for limitation of Personal Actions, 21 Jac. 16. c. And upon debate of the Plea the Lord Keeper conceived the Exception in the Statute as to the Merchants Accounts, did not extend to this Case, but only to Merchants trading beyond Sea.

The

The Lord Keeper.

Sir Jeffery Palmer *the Kings Attorny General on the behalf of* Woolrich *a Lunatick againſt* Woolrich. Mich. 1669.

A Bill brought by the Attorny General in the nature of an Information for the benefit of a Lunatick, as in the Caſe of Jerome Smith, f. 112.

The Defendant demurred, for that the Lunatick was no Party, which was ruled a good Demurrer: The Lord Keeper declaring it was as needfull to make the Lunatick a Party as an Infant, where a Suit was on his behalf: But in the caſe of an Ideot it muſt be otherwiſe, but a Lunatick may recover his Underſtanding, and then he is to have his Eſtate in his own diſpoſing. Where a Lunatick muſt be Party to a Suit for his own benefit. *Aliter* in caſe of an Ideot.

But obſerve the difference between this Caſe and that of Smiths.

Smiths Caſe was to be relieved againſt an Act done by the Lunatick in aſſigning a Debt, becauſe he was a Lunatick at that time; ſo that if he had been a Party, it had been to ſtultifie himſelf, which the Law does not admit. Vide Beverleys Caſe 4 Repor. and quære how it can be done by Information on his behalf.

But in Beverleys Caſe the King hath the cuſtody of his Perſon, of his Lands and his Goods ſo as to provide for the Ideot to prevent an Alienation; and therefore by Scire facias may avoid a Feoffment and other diſpoſition made by the Ideot. But the Book ſays, That that is not a breach of the Rule, that a Man cannot be admitted to ſtultifie himſelf, becauſe the Ideot is not Party to the Record in a Scire facias. And in that Caſe it is the ſame thing, and the Writ the ſame as to the Alienation of non compos mentis, or a Lunatick, or of an Ideot, and the King ſhall protect thoſe that cannot protect themſelves. And the Alienation of a non compos mentis, as well as of an Ideot, being found by Office, ſhall be avoided, tamen quære. And upon that ground I ſuppoſe it was thoſe Bills were grounded; for it was declared by the Court, that thoſe Bills were proper to be brought by the Attorny. And in Woolrich's Caſe the Bill was to be relieved upon a Where a Lunatick ſhall be Party to an Information on his behalf, and where not.

Marriage Agreement, for the benefit of the Lunatick, before he was a Lunatick so that he being a Party to that Bill did not tend to stultifie himself, and may be the reason why he should be a Party to it. And the other Bill tending to stultifie himself may be a reason why he should not be a Party to it.

The Master of the Rolls *in the absence of the Lord Keeper.*

Cadwallader Jones *Esquire against* John Lenthal *and his Lady.* Mich. 1669.

THE Bill was to be relieved for a Debt owing by Bond from Sir James Stonehouse, to whom the Defendant the Lady was his Executrix, which Debt and Bond the Plaintiff in his Answer to a former Bill had sworn, was fully satisfied to him, but that was to avoid a Sequestration of the Debt, as was alledged. And the Master of the Rolls, tho that Answer was set forth in the Defendants Answer in this Cause, would not suffer the Answer to be read against the Plaintiff, and so decreed the Defendants to satisfie the Debt.

Relief for a Debt, which the Plaintiff had sworn was satisfied before Answer.

DE

DE
Term. Sanct. Hill.

Anno Regis 21 & 22 Car. II.
IN
CANCELLARIA.

The Lord Keeper.
Juſtice Moreton.

Seymour *againſt* Noſworthy. January 19.

On a Demurrer.

THE Cauſe had been formerly heard in the Exchequer, where two ſeveral Trials had been directed, Will or no Will, and in both a Verdict for the Plaintiff. Yet the Chief Baron had diſmiſſed the Bill there, but without prejudice in Law or Equity. And now by an Original Bill the Plaintiff hath ſought relief here, for thoſe Matters he ſought relief in the Exchequer, and to examine Witneſſes in order thereunto, in perpetuam rei memoriam.

The Defendants pleaded the examination and diſmiſſion in the Exchequer, and that there ought not to be a new examination, the matter having been there full in Iſſue.

Dismission of a Cause without prejudice in Law or Equity how to be understood.

On the first hearing of this Demurrer the Court gave time to search for Precidents, where after a Cause heard upon the Merits, and dismist in the Exchequer, a new Bill had bæn admitted here: And none being to be found, now upon farther hearing of the Demurrer, it was for the Plaintiff insisted, that this was a special dismission, it being without prejudice either in Law or Equity, which words must be considered to signifie something; but they did not signifie any thing, unless it were meant the Dismission should not hinder the Plaintiff from seeking his relief in any other Court of Law or Equity. And so the Court did conceive, and ordered that the Plaintiff might examine any Witnesses that were not examined in the Exchequer, and that as to the Matters examined unto there, the Plaintiff might examine the same Witnesses de bene esse, and how far those de bene esse should be used, the Court would farther consider.

Matters formerly examined to in the Exchequer, may be new examined in Chancery.

The Master of the Rolls.

Bridget Dennis *by Sir* Alexander Frazer *her Committee against Sir* Thomas Badd, Frances Dennis *his Daughter and others.* January 31.

THE Case of Sir Thomas Badd was, That he was Guardian to Edward Dennis (whose Sister and Heir the Plaintiff is) and at fifteen years of Age married him to the Defendant Frances his Daughter. Sir Robert Dillington had a Mortgage of 200 l. of part of the Infants Estate, which Mortgage Sir Thomas Badd paid off, and took the same assigned to other Persons. The Infant after at seventeen years of Age made his Will, and the Defendant Frances his Wife Executrix. The Bill was, That tho Sir Thomas Badd had paid off the Mortgage with the Infants own Mony, yet he now pretends it was not for the benefit of the Infant, but that he paid it with his own Mony, and for what Mony he had of the Infants he was accountable to his own Daughter the Executrix, and so would leave the whole Mortgage-Mony still on the Mortgage-Lands, which belong to the Plaintiff as Sister and Heir to the Infant.

The

The Defendant Sir Thomas Badd by answer said, That the Mony he had paid Sir Robert Dillington was his own Mony, and that he had not near enough of the Infants to pay the same, and that if he had had enough of the Infants Mony, yet he could not justifie the disposing of it.

It was proved, that when Sir Thomas Badd paid off the Mortgage, he called in about 100 l. of the Infants Mony, and that that was applied that way.

An Infants Estate in his Gardians Hands ought to be applied to pay his Debts.

And in this Case the Master of the Rolls declared, That Sir Thomas Badd ought to imploy what he had of the Estate of the Infant, as far as it would go, to pay his Debts, and did Decree a Redemption of the Mortgage, and that Sir Thomas Badd should account; and that what he had of the Infants in his Hands, when the Mortgage was paid off, should be applied in discount of Mortgage-Mony, and upon payment of what more was due the Plaintiff to redeem.

The Lord Keeper.

Sir Jeffery Palmer *the Kings Attorny General on the behalf of the* King *and* Trinity-Colledge *in* Cambridge, *against* George Newman *Esquire.* Febr. 10.

THE Information suggests, that S. Newman was seised in Fee of the Lands in question, and possest of Books and Goods and out of a pious intent to provide for Maintenance of Poor Scholars in that Colledge, by his Will in Writing devised to the Master and Fellows of that Colledge, the Lands in the Information mentioned, and all his Monies, Goods, &c. and appointed the Premises to be imployed for buying Lands for maintenance of Scholars in the said Colledge, &c. with this Clause, That if any by Cavillation concerning the Law of Maintenance should go about to hinder this Bequest, or if any of his Bequest, might not be suffered to go to the Colledge, then the Defendant should enjoy all his Lands, Goods, &c. That by the Will the Premises are to be established with the Colledge, but the Defendant combines with others unknown, either Lords of whom the Lands are holden, or Heirs at Law, and pretends that by the Statute of Mort-

main

main the Devise is ineffectual, and so raiseth Cavils to defeat the Charity, and so has got the possession of the Lands and Goods, and refuseth to let the Master and Fellows have them, that if by the Statute of Mortmain the said Charity be avoidable, yet by other Laws for establishing of Charitable Uses, and according to Equity, the Charitable Use ought to be made good. Wherefore, and inasmuch as the preservation of Charitable Uses is of publick Interest and Concern unto his Majesty and the Colledge, and in respect of the Statute of Mortmain and Cavillation aforesaid they have no remedy by reason of the later Clause of the Will to be relieved in the Premises, they exhibited this Bill.

The Defendant answered and confessed the Will, &c.

The King as *Pater Patriæ* may inform for any publick benefit.

Stat. of charitable Uses.

And upon the hearing it was declared by the Court, That the King as Pater Patriæ may inform for any Publick Benefit for Charitable Uses before the Statute of 30 Eliz. for Charitable Uses. But it was doubted the Court could not by Bill take notice of that Statute, so as to grant a relief according to that Statute upon a Bill, but that the Course prescribed by that Statute by Commission of Charitable Uses must be observed in Cases relievable by that Statute. But no positive Opinion was delivered, for the Defendant consented to a Decree, and so what was done was by his Agreement, and not the Judgment of the Court.

DE

DE
Termino Paſchæ
Anno Regis 22 Car. II.
IN
CANCELLARIA

Wilmer *and his Wife againſt* William Kendrick *and* Jo. Vylet. May 17.

On a Demurrer.

WIlliam Kendrick ſeiſed in fee of the Lands in queſtion worth 90 l. per annum, and of other Lands, in all worth 100 l per annum by Indenture, 23 April, 17 Car 1. conveys the Lands in queſtion to the uſe of Thomas his eldeſt Son, for life, the Remainder to Truſtees for ninety nine years for the benefit of Martha, the Wife of Thomas, for a Jointure, the Remainder of thoſe and all other the Lands (of which by that Settlement Thomas was Tenant for life) after Williams death, to the firſt Son of Thomas in Tail, Thomas has Iſſue Martha the Plaintiffs Wife, and another Daughter, and the Defendant Kendrick his only Son. And by the Settlement there was a Power given to Thomas at that time during his life by any Writing to convey or appoint all or any of the Lands in queſtion, being but 90 l. per annum to any future Wife that Thomas ſhould marry, for a Jointure, or to any Child or younger Children of Thomas, ſo as that Conveyance or Appointment be made

Touching a defective execution of a Power.

made to commence after the death of Martha, (Thomas his Wife) for life or lives only of such Child or Children, and for their Preferment: Thomas having no other way to provide for his Daughters younger Children, 5 May 1657. for love, &c. to them, and for provision of Portions for them, grants, bargains and sells the Lands in question to the Defendant Vylet, Habendum to him and his Assigns for the Lives of the Plaintiff Martha and her Sister, and for their only use and benefit, to remain from the death of Thomas Kendrick and Martha his Wife.

The Plaintiffs by their Bill suggest, that the Plaintiff Martha had no provision but this, and that her Father did look upon it that he had well pursued his power in the Decree to Vylet, or else that he would have taken the Wood of the other Lands of greater value, which he knew were by the Settlement supra, to come to the Defendant, and complained that the Defendant taking advantage that the Power was not literally pursued, did stand upon it, whereas it was in substance pursued, and the Estate granted to Vylet was less than by the Power, Thomas had power to grant; for by the Power he was to grant to commence on the death of Martha his Wife only, and he made it to commence on the death of Himself and Martha, which was less than he had power to do; and the mistake did happen by reason that in the Settlement the Lands were limited to Thomas for life, the Remainder in Trust for a Jointure for Martha.

A defective execution of a power raised by a voluntary Conveyance, without help in Equity.

And it was charged by the Bill, that in Equity the mistake and defect ought to be helpt, the younger Children being otherwise utterly unprovided for, and so to be relieved was the intent of the Bill.

To which the Defendant Kendrick demurred, for that the Deed of Settlement, and Deed to Vylet was void in Law, and being defective in the execution of the Power, it ought not to be supplied in Equity. In the arguing of which Demurrer it was insisted, that both the Conveyances being voluntary, the case was the same here as at Law, and no reason to help here against Law at all. And it was said, That if such defects should be supplied in Equity, it would be in vain to imploy Men of skill in drawing Conveyances and Settlements, but every unskilful Man might do it as well. But if it had been a consideration of Money it was admitted it might be otherwise.

wiſe. And it was farther inſiſted, That it did not ſeem to be a miſtake in the Caſe, but done deſignedly; for if the Eſtate had been to commence upon the death of Martha, Thomas his Wife, then Thomas himſelf had loſt his own Eſtate for life after Martha.

The Court was all of Opinion, that the Law being againſt the Plaintiff (as it was admitted it was) Equity could not help the Plaintiff. Yet they did mediate with the Defendant to pay the Plaintiff Martha 20 l. for her life. *Vide* the Caſe of *Parvey* and *Bowen*, f. 22.

And the Cauſe having been formerly argued on the Demurrer, and a day given to the Plaintiff to produce Preſidents where in like caſe the Court had relieved; The Plaintiff produced a Preſident 6 July, 40 Eliz. Prince and his Wife Plaintiff againſt Green Defendant, where in effect the Caſe was thus; The Father ſeiſed in Fee of a great Eſtate, by Covenant to ſtand ſeiſed, ſettles the ſame to himſelf for life, the Remainder to his eldeſt Son, with power to himſelf to leaſe a ſmall part for forty years, who accordingly made a Leaſe for the benefit of a younger Child, which came by aſſignment to the Plaintiff, which the Defendant, the eldeſt Son would avoid at Law, the power not being well raiſed by the Covenant to ſtand ſeiſed. But it appearing to the Court the eldeſt Son was greatly advanced by the Father, and that the Conveyance, which was by Covenant, was intended to be by Livery, which he was adviſed would be as well by Covenant, The Court did decree the Plaintiff ſhould hold until the Defendant evicted him by Law, and did decree the Defendant to admit the power to make the Leaſe good in Law, if it did not prove an Intail paramount the Settlement, as he pretended. *Prince* and his Wife againſt *Green*.

A power to Leaſe raiſed by a Covenant to ſtand ſeiſed, is not good.

A defective Power made good in Equity.

The Lord Keeper.
Chief Baron Hale.
Juſtice Rainsford.

Elizabeth March, Richard Chaworth *and* Henry Malory *Executors of* Jane Duppa, *againſt* John Lee *Senior and* John Lee *Junior.* May 30.

Mortgage.

THE Cauſe coming to be heard, and argued on a Plea before the Lord Keeper, he directed a Caſe to be ſtated, and then would farther conſider of it. And now the Caſe being ſtated, it was thus:

Trin. 1669. The Plaintiffs by their Bill ſet forth, That the nintæth of January 1662. Henry Engliſh by Indenture and Fine (wherein the Wife joined) conveyed to the Plaintiffs Sir Richard Chaworth and Henry Malory and their Heirs, the Manor of Monfield in the County of Suſſex, to the uſe of Miſtris Duppa for five hundred years, as a Mortgage for the ſecurity of 4000 l. payable the fourth of March 1664. with Intereſt in the mean time. That on the fourth of March 1664. Mr. Engliſh mortgaged to Miſtris Duppa the Manor of Wigſel in the County of Suſſex for five hundred years for ſecurity of 3000 l. more, payable the fifth of June after, with Intereſt, and covenanted in both Deeds that the Premiſes were free from Incumbrances. 6 Auguſt 1664. Mr. Engliſh acknowledged to Miſtreſs Duppa a Recognizance in this Court of 2000 l. for payment of 1000 l. and Intereſt. The 7 of December after the 21 of October 1665. (the Mortgages and Recognizances being forfeited) Miſtreſs Duppa died before payment, having made her Will, and the Plaintiffs her Executors, who proved the ſame. Trinity-Term 1667. the Plaintiffs having brought ſeveral Ejectments, exhibited their Bill here againſt Mr. Engliſh and his Wife, That Mr. Engliſh might diſcover Incumbrances, and redeem by a day, or that his Equity of Redemption might be barred. Whereto Mr. Engliſh and his Lady after they had ſtood in a contempt to a Commiſſion of Rebellion, put in their Anſwer, but did not diſcover

diſcover any Incumbrances. Michealmas-Term 1667 Mr. Engliſh ſuffered Judgment in Ejectment at the Plaintiffs Suit, with a Ceſſet executio till May after. 18 May 1668 the ceſſet executio being expired, Mr. Engliſh notwithſtanding any Arguments the Plaintiffs Councel could make, obtained an Order of this Court for ſtay of the Plaintiffs Proceedings at Law upon the Judgment in Ejectment till hearing, and another Order. 5 June 1668, The Cauſe coming to be heard, the Court decreed that Mr. Engliſh ſhould pay what was due to the Plaintiffs in a twelvemonth, or in default the Plaintiffs ſhould enjoy the Premiſes diſcharged of all Equity of Redemption againſt him, and all claiming under him. 26 November 1668. The Maſter to whom it was referred to take the Account, reported 8530 l. 14 s. payable to the Plaintiffs the ſixth of June 1669. 5 February 1668 the Report was decreed, and the Decree thereupon ſigned and inrolled.

The Bill farther chargeth, That the Defendants deſigning to elude the ſaid Decree, and defeat the Plaintiffs of the Benefit thereof, and of their Judgment in Ejectment, pretended that Mr. Engliſh had mortgaged to them in June 1665, in Fee the Manor of Wigſel for the ſecurity of 2000 l. payable the twenty ſeventh of June 1666, which for non-payment was become forfeited. The Defendants having had notice, and being acquainted with the Contents of the Plaintiffs Bill and Proceedings thereupon againſt Mr. Engliſh and their Securities and Titles to the Premiſes, about a Week before the ſame came to hearing, exhibited their Bill here againſt Mr. Engliſh and the Plaintiffs to diſcover the reality of their Securities, and what was due thereupon, and prayed relief therein upon the Title of their Mortgage. 20 Oct. the Plaintiff moved the Court again, which was between the times of the Decretal Order, and pending the Reference to the Maſter upon an Affidavit, that Mr. Burrel and ſeveral others had Incumbrances on the Premiſes precedent to the Plaintiffs, to diſcharge the Order of the eighteenth of May laſt, whereby their Proceedings at Law for the recovery of the poſſeſſion of the Premiſes had been ſtayed, and that they might be at liberty to proceed upon their Judgment in Ejectment to recover the Poſſeſſion, which the Court however thought not fit to grant, but continued the former Order. That the Lees by means thereof ceaſed the Proſecution of their Suit in this Court againſt the Plaintiffs, and while the

Plaintiffs were tied up by the Order of this Court from getting poſſeſſion, bought in a Mortgage made in 1649. by Mr. Engliſh to Mr. Burrel of part of Wigſel for 1000 l. and a Statute in 1656. acknowledged by Mr. Engliſh to Mr. Burrel of 800 l. for payment of 400 l. and have extended the Statute on both the Mannors at not above the third part of the value, and by virtue thereof intend to evict the Poſſeſſion and to pay themſelves as well the 2000 l. and Intereſt, as the 800 l. and 1000 l. and Intereſt, before the Plaintiffs ſhall have any fruit of their Decree, and that the Defendants ought, and that the Plaintiffs have offered them upon their payment to them the 8530 l. 14 s. and Intereſt, to aſſign their Securities, or elſe that the Defendants would accept what is due upon the Statute and Mortgage to Burrel, and thereupon aſſign them to the Plaintiffs, and yet they refuſe to do it.

And ſo to be relieved in the Premiſes is the Prayer of the Bill.

Mich. 1669. The Plea and Anſwer of *John Lee* Senior, with the Anſwer of *John Lee* Junior.

THE Defendant John Lee the elder, to ſo much of the Bill as ſeeks relief concerning the Mannor of Wigſel by ſetting aſide or prejudicing any Title he or the other Defendant hath, or for diſcovery thereof until he be ſatisfied the Mony in his Plea mentioned, for Plea ſaith, That about the one and twentieth of June 1665. the ſaid Engliſh affirmed that he was ſeiſed in Fee of the Mannor of Wigſel free of Incumbrances, and the Defendant finding him in poſſeſſion, and believing that he was ſo ſeiſed, and knowing nothing to the contrary in conſideration of 2000 l. paid by him, took a Conveyance of the Inheritance in Fee-ſimple thereof from Mr. Engliſh, in his and the other Defendants Names, for the ſecurity of 2000 l. payable the twenty ninth of June 1666. whereof no part is paid, but the Eſtate abſolute. That the Defendant at the time of the Conveyance or before, had no notice of the Plaintiffs Securities, or any of them; but long after hearing that Mr. Engliſh had incumbred the Premiſes with the Plaintiffs Securities, and by a Prior Mortgage to Mr. Burrel for 500 l. for ſecuring 1000 l. which was forfeited in November 1649. had incumbred

cumbred part of Wigſel, and in November 1655. had acknowledged a Statute to Mr. Burrel of 800 l. for payment of 400 l. which was alſo forfeited, did by adviſe of his Counſel for ſecuring the Premiſes, convey to him and the other Defendant for 1090 l. by him paid, purchaſe in Mr. Burrel's Mortgage, and agree with him to extend the Premiſes, and for 430 l. to aſſign the ſame as the Defendant ſhould direct. That the Statute was extended, and the Defendant paid Burrel 430 l. who aſſigned the extended Premiſes as the Defendant did direct. That the Defendant made the Purchaſe of Burrel principally to ſecure his Title, and to protect from Incumbrances the Premiſes conveyed to him and the other Defendant, and to reimburſe the ſeveral Sums of Mony by him paid with Damages, or at leaſt ſo much as ſhall be really due on the ſaid Burrels Mortgage and Statute, and demands Judgment. And by Anſwer ſaith, That after his Purchaſe, and not before, he heard of the Plaintiffs Incumbrances, and heard alſo of Burrel's Mortgage and Statute; and and that before he bought Burrel's Mortgage and Statute he had notice of ſome Proceedings by the Plaintiffs had in this Court againſt Mr. Engliſh touching the Premiſes, but were no Parties thereto, but what the ſame were, referred to Records there and Proceedings at Law, and thereupon by advice of Councel he did purchaſe the ſaid Mortgage, Leaſe and Extent Nov. 27. 1668. That the Agreement for the Mortgage and Statute with Burrel was intire, tho perfected with ſeveral Inſtruments, and the Conſideration mentioned to be ſeveral, and Burrel refuſed to extend the Statute and aſſign the Extent, unleſs the Defendant paid him what was due on his Mortgage and Statute. The Defendant ſubmits, that if the Plaintiffs will let him enjoy his purchaſe Lands free from Incumbrances, to pay him the Purchaſe Mony and Damages, and will pay him what he paid Burrel, with Damages and Coſts, if he will accept it. The reſt of his Anſwer is to the effect of his Plea.

John Lee Junior, his Anſwer.

By his Anſwer ſaith, That he claims nothing in the Premiſes to his own uſe, his Name being only uſed in Truſt for the other Defendant, and had no notice of the Plaintiffs Title a long time after the Defendants Purchaſe, and refers in all things to the Plea and Anſwer of the other Defendant.

In

In this Caſe theſe Queries were made on the Plaintiffs part.

Whether a Statute bought in by a Mortgagee ought to be uſed as to Lands not in his Mortgage.

I. Whether upon the paying to the Defendants what is due to them upon the Mortgage and Statute to Burrel, they ought not to have the ſame aſſigned to them? And if not, Whether the Statute being but an Incumbrance and no Eſtate, ought to be made uſe of as to the Manor of Monfield by the Defendants, wherein the Defendants have no Eſtate, and the Title the Defendants would protect is not a Mortgage or Incumbrance, and not to protect the Title of an abſolute Eſtate.

Whether a Mortgagee ſhall protect his Mortgage by Incumbrances bought in againſt a Title he had notice of before, and under which the party was then in poſſeſſion.

II. Whether the Plaintiffs having Judgment in Ejectment for the Poſſeſſion long before the Defendants bought in Burrel's Mortgage and Statute, and after the Defendants had notice of the Plaintiffs Title and Proceedings in this Court, and notwithſtanding their Endeavours to the contrary being ſtayed by the Order of this Court from recovering the actual poſſeſſion, they might be looked upon as actually in poſſeſſion? And in that Caſe, Whether ſhall the Defendant make any uſe of Burrel's Mortgage and Statute bought in pending the Injunction, and after the Decree againſt Engliſh other than to reimburſe themſelves the Mony thereon due? And if not,

III. Whether by the Defendants getting in the Statute, in manner as is before expreſſed, he ſhall be at Liberty to make uſe of it only againſt Monfield in the Plaintiffs hands, and ſo force them to pay off the Penalty of the Statute, or clear the ſame, which Burrel himſelf could not have done, but all the Lands muſt have been charged with the ſatisfaction of Burrel's Statute, as well thoſe in the Defendants hands as the Plaintiffs?

And theſe Queries were made on the Defendants part.

A Mortgagee may protect himſelf by getting in an old Incumbrance though nothing be due on it.

I. Whether the Defendant Lee, being a real Purchaſer bona fide of Wigſel for 2000 l. from Engliſh then in poſſeſſion, without any notice of any of the Plaintiffs Incumbrances preceding to his Purchaſe, might not purchaſe in the Mortgage Leaſe of Wigſel made by Engliſh to Burrel, and the Extent of Burrel's Statute preceding to the Plaintiffs Incumbrances, both forfeited in point of Law, and protect his Purchaſe

Purchaſe of Wigſel till the 2000 l. and Intereſt be paid? And whether there is any Equity againſt him for the Plaintiff any way to weaken his legal Securities for enjoying his Purchaſe till the 2000 l. and Intereſt be paid, admitting that nothing had been due on Burrels Mortgage or Statute in Equity, and the Defendant had paid nothing for purchaſing in that Mortgage and Extent?

II. Whether the Defendants having paid to Burrel 1520 l. for the Mortgage Leaſe and Extent of the Statute, ſhall be reſtrained from taking the benefit of the Law by the ſaid Mortgage Leaſe and Extent ſo far upon any the Lands of Engliſh in the hands of the Plaintiff or any others to recover what he really paid to purchaſe in the ſame, ſo as they after ſuch ſatisfaction make no other uſe of the ſaid Burrels Mortgage or Extent than only to protect his own Purchaſe Lands till the 2000 l. and Damages be ſatisfied?

Whether a Mortgagee buying in an Incumbrance that chargeth other Lands alſo, ſhall be reſtrained from his legal courſe to reimburſe himſelf the Mony paid for that Incumbrance, ſo as he uſe it only to protect his Mortgage.

III. Whether the Defendant having paid his aforeſaid Purchaſe for a valuable Conſideration, without notice of the Plaintiffs Incumbrances, and by Anſwer offers to take the Mortgage Mony and Damages, and the Mony paid for Burrels Mortgage and Extent and Damages and Coſts, and quit the whole, or elſe to enjoy the Mortgage free from Incumbrances, and be paid what he paid Burrel with Damages and Coſts, and make no further uſe of Burrels Extent than only to protect his purchaſed Lands from Incumbrances; That a Court of Equity ſhall give any further Relief againſt him to his prejudice being a Purchaſer without Notice, and if any, what Relief?

IV. Whether the Defendants, who are no Parties to, nor at all concerned in the former Suits between the Plaintiffs and Engliſh, or concerned in any of the Orders or Proceedings therein ſhall be in any ſort affected with, or prejudiced by any of thoſe Orders?

The Court unanimouſly agreed, That the Defendant ought not in any ſort be impeached in Equity as to Wigſel, but might keep his Statute and Security on foot to protect his Mortgage, and that the Proceedings in Chancery againſt Engliſh by the Plaintiffs did not at all influence this

this Caſe. But as to the Manor of Monfield, in which the Defendants had no Eſtate before they bought in the Statute, the Court inclined that ſo much of Wigſel as was not in Burrel's Mortgage (for he could not extend on himſelf) Monfield ſhould be accounted for at the real value, in order to diſcharge Monfield of the Extent; but not ſo as to prejudice the Extent in courſe of Law as to Wigſel: But that the Statute ought to protect Wigſel, as far as by any courſe of Law it might.

On the Argument of this Caſe was produced Higgon againſt Udal, and Medleton againſt Shelleh, 19 June Car. 1. for Preſidents.

On the Hearing of this Caſe, which was a parallel Caſe, the Court would be ſatisfied there by Preſidents before they would give any Relief againſt Purchaſers in of Incumbrances to protect a real Title, and the Cauſe went no further here. But the Plaintiff, as the Chief Baron now ſaid, brought his Bill in the Exchequer afterwards, and was there diſmiſt.

And in the principal Caſe the Plea was allowed.

DE
Term. Sanct. Trin.
Anno Regis 22 Car. II.
IN
CANCELLARIA.

The Lord Keeper.
The Maſter of the Rolls.

Hurſt *againſt* Goddard. June 7.

THE Caſe was thus. There was a Sum of Mony provided by a Settlement of Lands to be raiſed for Daughters Portions; one of the Daughters marries and dies; before her Portion paid her Husband takes Adminiſtration to her, and aſſigns all his Intereſt in that Portion to his Son by a former Wife. The Son by this Title (the Father being dead) ſued in Equity for this Mony.

Things in Action aſſignable in Equity, and how

It was inſiſted for the Defendants, That though things in action might be aſſigned here on a conſideration by the party that had the Intereſt, and were recoverable here by the Aſſignee; and that a Releaſe afterwards by the Aſſignor, unleſs it were without Notice and on conſideration to him to whom the Releaſe was, would not hurt the Aſſignee; yet here the Aſſignment being by an Adminiſtrator,

and not the person that had it in his own right, this had never bæn good, for there might be a Creditor to satisfie the Intestate, &c.

The Lord Keeper did think there was a considerable difference betwæn the assignment of the Party and of the Administrator, where the Administrator was a Stranger, or had not Right before, and no colour of Right but meerly by the Administration. But here in this Case the Administration was pro forma only, for here he had a Right to the Mony, as a Portion or Provision for his Wife, and every Man hath not ready mony to give Daughters, but their Portions are to be provided for by this means, and therefore its reasonable to advance or promote the establishing of them, so that they might be disposable by the Husband (who settles a Joynture) as Mony it self may be. And so decreed for the Plaintiff.

The Lord Keeper.
The Master of the Rolls.

Martin *against* Seamore. June 13.

RObert Seamore being seized of the Lands being Copyhold, in Fæ, surrenders them to the Plaintiff by way of Mortgage, for Mony lent, and in a few days after surrenders them to the use of his Will, and then by Will deviseth them to his Wife for life, Remainder to his Daughter in Fæ, and dyeth. There was a failer to present the Plaintiffs Surrender at the next Court, but the Wife got her self admitted.

The Plaintiffs Bill was to be relieved for this Mortgage mony, and set aside this Surrender and Will, being voluntary, unless the Wife and Daughter would pay him.

For the Wife it appeared, there was an Agrement of the Husband, in consideration of the Marriage, to settle the Premises on her for Life, and insisted that the Will and Surrender to her was pursuant to that consideration and Agræment.

For

For the Plaintiff it was inſiſted, that if a Copyholder for Mony had agreed to ſell or mortgage his Copyhold, that by ſuch Agreement he ſtands truſted for the Vendee, and that no voluntary diſpoſition afterwards could prejudice the Vendee, nor no diſpoſition for Mony with notice of that Agreement: And that the Plaintiff having a Surrender ought not to be in a worſe Caſe than if he had only an Agreement.

A Copyholder having for Mony agreed to mortgage Lands ſtands truſted for the Mortgagees.

Court. As to the Wife ſhe being in purſuant to a precedent Agreement to the Plaintiffs Title, would not impeach her Eſtate. But as to the Daughter, hers being purely a voluntary Eſtate, It was ordered, that unleſs ſhe would pay the Plaintiff his Mony he ſhould hold and enjoy the Premiſſes againſt her.

A Surrender void for want of Preſentment made good againſt a voluntary diſpoſition.

The Lord Keeper.

Juſtice { Twiſden, Wyld, Rainsford.

Roſs *againſt* Roſs. July 14.

THE Caſe was this: Francis Roſs had Iſſue James his lawful Son, and John a Baſtard Son, and deviſeth by his Will in writing to his Baſtard Son his Tail Lands that were held in Capite, and ſuffers Copyhold Lands to deſcend on James. James and John agree, that John and his Heirs ſhould enjoy the Copyholds, and James and his Heirs the deviſed Lands.

Tenant in Tail bound by his Agreement to convey.

This Agreement being executed, James had a Decree againſt John to levy a Fine, and ſettle it accordingly. John dies in contempt for not doing that (which if he had done the Eſtate Tayl had been barred) The Defendant, the Iſſue of John, entred into the Copyholds, and enjoyed them: And to force him to execute the Agreement was the intent of the Bill.

Maynard for the Defendant. Its not like the Caſe of Octavian Lumberd, for by that Agreement the Eſtate Tail was made good, which otherwiſe would have been avoided; but a perſonal Agreement, or Agreement for other Lands will not bind the Iſſue.

The Iſſue in Tail is not bound by the Agreement.

Iſſue in Tail accepting the ſatisfaction agreed to be given, the Tenant in Tail is bound by that means.

Reſolved by the whole Court, 1. That if the Tenant in Tail agrée to convey, he is bound by that Agrément.

2. If he die, his Iſſue is not bound by it.

3. That if the Iſſue do accept of that Agrément, and enters, as in this Caſe, on the Land, it now becomes his own Agrément, and ſhall bind. And ſo decrée it againſt the Defendant.

The Lord Keeper.

George Stowel *Eſquire againſt* George Long *Executor of* George Long. June 14.

SIR John Stowel (whoſe Heir the Plaintiff is) was indebted to the Defendants Teſtator by Judgment and Counterbond, the Defendants Teſtator having paid the Debts he was bound in as Surety for him. Sir John was ſequeſtred, and his Eſtate expoſed to Sale by the Parliament for his Loyalty to the late King. The Defendants Father bought a Farm of the Truſtées for Sale, part of Sir Johns Eſtate, and in the Purchaſe had allowance of his Debt by Judgment and on the Counterbond, and paid the reſt of the Purchaſe Mony, as was uſual, by Bills, &c. The Defendants Teſtators Purchaſe was in 1652. and he entred and held till 1660. the Kings Reſtauration. He being dead, the Plaintiff who claimed under Sir John Stowel, exhibited a Bill to call the Defendant to an account, and ſuggeſted, that the Land was conveyed by the Truſtées in ſatisfaction of the Judgment, and that by the Profits taken the Judgment was ſatisfied, and therefore ought to hold the Lands againſt the Judgment which was extended for the Defendant.

It was inſiſted, that for all the Profits the Defendants Teſtator took under the Sale, it was pardoned by the Act of Indempnity; And that the Defendants Teſtator, beſides this Judgment and this Bond, paid a great Sum of Mony for the Purchaſe. And yet it was offered to come to an account, if the Plaintiff on account would pay the Defendants the Debt due by Judgment and on the Counterbond, and the Mony paid for the Purchaſe. And upon that offer the Court decrée it to an Account. Though

it

it was for the Plaintiff strongly opposed, that the Debt Sir John owed him by Counterbound (it not being within the Judgment) should not be brought into the account, or allowed the Defendant. But inasmuch as that Debt was allowed the Defendant as part of the Consideration in the Purchase of the Estate, the Lord Keeper did order that to be brought into the account and allowed the Defendant, and declared, that if the Defendants Counsel had not offered to account, he would not have ordered an account, for that all Monies received by the Profits are pardoned by the Act of Oblivion.

A Creditor of a Delinquent having his Debt allowed him in the Purchase of the Delinquents Estate, shall not be put to account for the profits under the Purchase in discharge of his Debt.

Troner *against* Hassold. June 16.

THE very same Case with that of Wembergh and Tough before fol. 123. save that the Debt was by Bond, and entred into here. And upon a Demurrer the Lord Keeper ordered the Defendant to answer; but saved the benefit of the Demurrer to the Hearing.

Whether Articles of Peace can discharge a Subjects Debt.

The Lord Keeper.

Dame Flora Backhouse *against* Simon Middleton *and others.* June 17.

SIR William Middleton seized of the Kings Moiety in the new River Water in Fee, consisting of 36 shares, 1646. conveyed the same to Henry Middleton and others, upon Trust for himself and his Wife, during their respective Lives, and after that the Trustees out of the Rents and Profits of the Premisses should pay his Debts and Portions for his Daughters at certain days, and after to permit Sir Hugh Middleton Heir of Sir William and his Heirs, to take and receive the Rents and Profits of the Premisses. Sir William and his Lady dyes. Sir Hugh in June, 1657. contracted with William Bishop, former Husband of the Plaintiff, for Sale of fourteen shares to him of the Kings Moiety for 7000 l. whereof 250 l. in hand, and the rest to be paid as Sir Hugh and Bishop and the Trustees should agree, for the Daughters Portions, which

which are ascertained by Sir William at several great Sums. In December 1657. the Defendant Simon contracted with the same Sir Hugh by Articles under Hand and Seal, for all the Kings Maiety at 151000 l. and in January after Sir Hugh and his Wife and Henry Middleton (the only active Trustee) execute a Conveyance to Simon according to the Articles. In Hillary, 1657. Bishop exhibits his Bill against Sir Hugh to inforce an Execution of the Agrément, which the Defendant answered. Hillary 1658. Simon Middleton brought his cross Bill against Bishop, Sir Hugh and the Trustées to have a Conveyance, &c. February 1659. Bishop exhibits Interrogatories in his Cause. November 1660. one Witness sworn thereon. 4 March 1660. Bishop dies, yet the Witness sworn not examined, Bishop having devised the benefit of his Contract to the Plaintiff, being his Wife, and her Heirs. 24 January 1661. She brings a Bill of Revivor. 24 Nov. 1662. she marries Sir W. Backhouse, and so her Suit abates. 27 Nov. 1663. Simon Middleton's Cause heard and decrée for him. 1 Decemb. 1663. Sir William Backhouse by Petition gets Simon Middleton's Decrée stopt. 2 Decemb. 1663. He brings a Bill of Reviver in his own and his Wifes Name. 18 May, 1664. He exhibits a new Schedule of Interrogatories, and on those Interrogatories some Witnesses are examined. 11 June 1664. This Cause was heard, and the Plaintiffs claiming as Devisées to the Plaintiff in the first Cause, and the Heir of Bishop, whom only it concerned to contest, the Devisée being no Party; and a Devisée not being intituled to a Bill of Reviver, this Bill was dismist without prejudice to a new Bill.

A Devisee cannot bring a Bill of Reviver, not being in Representation to the Devisor, but in nature of a Purchasor.

Then an original Bill setting forth the former Proceedings and the former dismission was exhibited by Sir William Backhouse and the Plaintiff his Wife, which also abated by Sir Williams death, and was revived by the Plaintiff, and answered by the Defendants. And then Issue being joyned, the Plaintiff moved to have the use of the Depositions taken upon the former Bill, which was dismist, made use of in this Cause, those Witnesses being dead.

This Matter was several times strongly debated by Counsel on both sides, where for the Plaintiff it was insisted, That though a Bill be dismist, yet the Depositions taken on such Bill are to be made use of here or at Law, and that the Bill was not dismist on the point of Right,

but

but for matter of form. And that its usual and frequent to use Depositions taken in one Cause, if for the same matter that is in controversie in another, especially if against the same Defendant, as here it is; which was admitted by the Defendants Counsel. But as to the using of Depositions in a Cause dismist this difference was taken; that though where a Cause is dismist the matter of it not being proper for Equity to decree, yet the Fact in this Cause proved may be used as Evidence in that Fact betwen the same Parties when ever it shall come in question again. But when a Cause is dismist not upon that ground, but upon irregularity, as for that it comes by Reviver when it should come by original Bill, so that in truth there was never regularly any such Cause in the Court, and consequently no Proofs, these Proofs cannot be used; for Proofs cannot be exemplified without Bill and Answer; nor can they be read at Law without the Bill, on which they were taken, can be read. But this Bill of Reviver could not be read at Law, and therefore the Proofs taken upon it cannot be used here. And so upon long debate, and after several formal Arguments it was ruled about Michaelmas Term 1669. in this very Cause by the Lord Keeper.

When Depositions in a Cause dismist shall be used or not.

And now upon the hearing of this Cause, the endeavour on the Plaintiffs part was to prove a Notice in the Defendant of Bishops Contract, which was opposed by the Defendant. But the Notice being proved, it was for the Defendant insisted, that there was no ground to decree the Agreement made by Bishop, it being made by a Cestuy que Trust of the Suplus only, and the Trustees no Parties, and the second Agreement by the Defendant Simon Middleton is examined before any Bill brought by Bishop against the Cestuy que Trust; and the principal Trustee (who being examined as a Witness) swears that he did disapprove of the Agreement with Bishop, and would never consent to it. And it was farther insisted for the Defendant Simon, that the Agreement with Bishop was not pursued, nor could Sir Hugh inforce the payment of the 6750 l. it being to be paid as the Trustees and he should agree, so that that was no compleat Agreement; and the Trustees disagreeing, and having executed the other to Simon the Defendant, the Agreement with Bishop ought not now to be decreed, especially for the Plaintiff, who claimed the benefit of it by Devise only, which at the best was a Devise of an Equity on an Equity.

An Agreement for the Purchase with the *Cestuy que trust* of the Surplus not good unless the Trustees are Parties.

But

But for the Plaintiff it was inſiſted, that the Truſtees had not by the Truſt power to ſell, they being to pay the Daughters Portions out of the Rents and Profits.

A Truſt to pay Portions out of Rents and Profits at prefixt days gives the Truſtees power to ſell.

To which it was replyed by the Court, that the Truſts were not to pay the Portions out of the annual Rents and Profits, but out of the Rents and Profits, and thoſe Portions were to be paid at prefixt days, which the annual Profits would not do; and therefore conceived the Truſtees might ſell for that purpoſe within the intention of the Truſt; and ſo declared he was of Opinion to diſmiſs the Bill, but withal ſaid he would think further of it. Vide the end of this Cauſe in Cornbury againſt Middleton.

The Lord Keeper.

Pitt *and others againſt* Pelham *and his Wife, and* Mabel Shirly. July 4.

William Shirly ſeized of the Lands in queſtion, ſettled them on Jane his Wife for a Joynture, Remainder to the Heirs of their two Bodies, Remainder to his own right Heirs. Afterwards in 1657. he made his Will in Writing in theſe Words, I make my dear Wife my ſole Executrix: My Land at *Blandford*, which is my Wifes Joynture (which is the Land in queſtion) I confirm unto her; and after her death I appoint it to be ſold, and the Mony that is made of it, to be divided in equal portions amongſt theſe four, namely, one part of it to be diſpoſed of by my Wife, and one to *William Major*, one to *Ezra Shirly* (who was Heir at Law) and one to *Jonadab Savidge*, and in caſe any of my three above named Nephews ſhall dye before the death of my Wife, my coſin *Roger Higham* ſhall have the portion of Mony, which upon ſelling my Land at *Blandford* ſhould have fallen to that Nephew, and dies, leaving Ezra his Heir. Ezra Shirly dies before Jane, leaving the Defendants the Women his Siſters and Co-heirs. Jane the Executrix, Major, Savage and Higham in 1663. exhibit their Bill againſt Mary and Mabel the Defendants, who prove the Will, and compel them to ſell. They anſwer, and in 1664. Witneſſes are examined. Pending this Suit the now Plaintiff being only Tenant to part of the Lands from year to year, purchaſes of Major, Savage,

vage, Higham and Jane, their Interest given them by the Will. Jane dies in 1666. and makes Higham and Harris her Executors; the now Plaintiffs Pitt, Major, Savage, Higham and Harris exhibit their Bill to compel the Coheirs to convey the Lands to Pitt and his Heirs.

The Cause was first heard before the Master of the Rolls, and it was then ordered a Case should be drawn up and heard before the Lord Keeper.

And on Hearing before the Lord Keeper 7 Novemb. 1668. because the Cause appeared to be of weight and consequence, his Lordship ordered Copies of the Case to be delivered to Justice Twisden and Justice Wild, and will advise with them and appoint a day to deliver his Opinion.

29 April 1669. the Cause was heard by his Lordship, assisted with those Judges, at which time it was by Serjeant Maynard insisted for the Plaintiff, that the Will was good in Law if the same was executed, but could not compel an Execution at Law, and therefore Equity ought. And as to the pretence that there was no person named to sell, he said, that when the intention is clear, all means without which that cannot be attained must be supplyed by a Court of Justice, Dyer 371. 2 Leon. Rep. 222, & 278. a Case in point, and the Devisor hath power to dispose as he pleaseth: And though the Devise be not of an Estate, but of an authority to sell, its good within the Statute. And if a Devise be to an Heir upon a Condition that he sell, this Condition is void; but yet it is good by way of Trust in Equity, for it lies within the power of an Ancestor to charge his Lands with a Trust, and the Heir must sell. And the Presidents of the Court do run, that the Heir is to sell, and cited Batersby and Prince in the Lord Coventrys time, and Tennant against Brown, 18 Feb. 1659.

When the intention is clear, Justice must supply the means to attain it.

A Devise to an Heir on Condition, void in Law, yet good in Equity.

Serjeant Fountain for the Plaintiffs. Originally this is a good Will, and the Land might have been sold; and if by any accident it be prevented, as by the death of the Executor, this Court ought to help it. And it is not denied, that if the Will had been to sell to pay Debts, it had been good, and the Heir should have sold: And there is no difference between Debt and Legacies, and here the Money is given for Legacies, but shall be raised by the Sale; and he relyed on it, that the Executor might have sold.

Mr. Solicitor Finch for the Defendants. There are two Questions: 1. What the Law is? 2. What the Equity? The Law is against the Plaintiffs. If Land

When Lands are appointed to be ſold, and no perſon appointed to ſell, the Executor ſhall ſell.

be appointed to be ſold for payment of Debts, and no perſon is appointed to ſell, the Executor ſhall ſell, becauſe the Soul is concerned, which the Executor is to take care of. But it's otherwiſe in a voluntary diſpoſition, as here; and it is not like the Caſe of Howel and Barns, 1 Cro. 328. for there the Executors were appointed to ſell.

Serjeant Ellis for the Defendants. The Deviſe is a void Deviſe in the Creation, becauſe no perſon is appointed to ſell; or if good in the Creation is void ex poſt facto, for no Bond of the Anceſtor binds the Heirs, unleſs he be expreſly named.

The Lord Keeper doubted whether the Will be void in the Creation; for it's againſt a Rule in Law, to make it void, if by any conſtruction it can be made good.

Twiſden doubted that the Executor of the Executor cannot be compelled to ſell in this Caſe, the Sale not being to be made till after the death of the Executor.

Wyld conceived the Deviſe good in the Creation, the intent appearing; and the Caſe in Leonard is the very Caſe, and was of Opinion, that the Executor of the Executor ſhall ſell; but doubted whether the Heir be compelled to ſell.

Preſidents on both ſides were given in to the Lord Keeper and the Judges. And 18 May, 1669. the Lord Keeper after advice with the Judges in order to the determination of the Cauſe, ordered a Tryal of theſe Points in a feigned Action.

1. Whether Jane the Executrix had Power, and could by the Will have ſold the Lands?

2. Whether a Sale by her Executors (admitting ſuch Sale to be actually made) be a good Sale?

And after Tryal either Party to reſort to the Court for a final determination.

Upon the Tryal by conſent of Counſel a ſpecial Verdict was found, and upon ſeveral ſolemn Arguments thereon by Counſel on both ſides at the Common Pleas, the Court gave Judgment unanimouſly on both Points for the Defendants. Thereupon the Defendants move to diſmiſs the Bill. And it is ordered that the Cauſe be ſet down for Hearing before the Lord Keeper upon the Equity reſerved.

And now upon Hearing thereof before his Lordſhip, it was for the Plaintiff inſiſted, that it was plain by the Will that the Lands ſhould be ſold, and no perſon by Law can

ſell

ſell but the Heir, and therefore the Heir muſt ſell; and that Matter was not tryed, but the Matter tryed was improper, for it was not to the purpoſe. And the Preſidents of the Court run, that the Heir ſhould ſell, and therefore though the other Iſſues tryed are againſt the Plaintiff, that is not, but remains in Juſtice for the Plaintiff; and cited divers Preſidents, viz.

Hughs *and others Plaintiffs againſt* Collis *Defendant.* 1 Febr. 16 Car. 1. *Hughs* againſt *Collis.*

The Caſe was thus. The Plaintiffs were Creditors of the Teſtator. The Defendants were his Executors, and Daughters Legatées. The Bill was to inforce the Sale of the Teſtators Lands for payment of his Debts by the Executor (who by Anſwer ſubmit to ſell, if the Court thought fit, having in truth ſold part before.) And the Words of the Will were thus: As for my Lands, Tenements, Goods and Chattles, I give and bequeath, as followeth: After my Debts paid to my five Daughters 100 l. apeece, and to be paid at their Ages of twenty years: Alſo I give to my Wife, whom I make my Executrix, all the reſt of my Lands and Tenements, Goods and Chattels. The perſonal Eſtate was not ſufficient to pay the Debts, nor could the Executrix out of the Profits of the Premiſſes, being but 63 l. per annum, raiſe Mony to pay the Debts and the Daughters Portions, being 500 l. Therefore the Court conceived it was intended by the Will, that the Executrix ſhould raiſe Mony to pay the Debts and Legacies, and decreed the Executrix to ſell accordingly, and by Sale to ſatisfie the Plaintiffs; but before the Executrix was to receive any part of the Purchaſe Mony, ſhe was to give Security to pay the Daughters their Portions at their Ages of twenty years (they being then in their Infancy) and that the Daughters ſhould, when they came of Age, releaſe the Lands to the Purchaſor.

Portions deviſed out of Lands payable at prefixt days, which the Premiſſes will not do, amounts to a Deviſe to ſell.

Another Preſident was,

Lockton *againſt* Lockton. 13 Nov. 13 Car. 1. *Lockton* againſt *Lockton.*

Where Lands were deviſed to be ſold, and the Monies to be diſtributed to ſeveral perſons, and no perſon was named to ſell, there by conſent of Counſel it was decreed that the Executor ſhould ſell.

Another Preſident.

Auby *and others, Creditors of* Walker, *againſt* Doyl *and others Heirs of* Walker.

The Words of the Will were theſe: My Will and Mind is, and I do hereby authorize that my Executors hereafter named ſhall ſell my Lands and Woods thereupon growing, to any perſon or perſons, and their Heirs, for the beſt value, and with the Monies thereby raiſed to pay all my juſt Debts. 16 Febr. 1655. **The Lords Commiſſioners aſſiſted with Judges (the Executors being dead) upon View of Preſidents decreed the Heirs to ſell.**

Tenant againſt *Brown.*
The Executor of an Executor to ſell when the Executor fails to ſell.

Tenant *and others againſt* Brown *and others.* 18 Febr. 1659.

The Sale being to be made expectant upon a contingent Eſtate, which did not happen in the Executors time, but was decreed to make the Sale; but hapning after his death, his Executor, and thoſe that claimed the Land after his death, decreed to ſell.

And for the Plaintiff in the original Caſe it was ſtrongly inſiſted, that it was all one where Lands were deviſed for payment of Legacies or younger Childrens Portions, and for payment of Debts, and that was as much a Truſt of Lands in the principal Caſe that it ſhould be ſold, and the Mony paid, as it is where Monies are appointed to be paid out of the Profits of the Lands.

Edwards againſt *Groves, Hob.* 265.
Whether the Heir ſhall be forced to ſell Land deviſed to be ſold after the death of the Executor, when no party is named to ſell.
A difference between a Deviſe of Mony out of profits of Lands, and of Mony raiſed by Sale of Lands.

The Lord Keeper. **This is not like the Caſe where a Father makes Proviſion for younger Children; for a Parent is bound to provide for them; nor is it like to the Caſe of a Sale to pay Legacies at large; but here they are Sums in groſs; and conceived a difference may be taken between the Principal Caſe and Monies appointed to be raiſed out of the Profits of Lands, that doth not amount to a total diſheriſon, but only a Charge upon the Land in the Heirs hand, and ſo that favours more of a Truſt than in the Principal Caſe; and ſo decreed the Bill to ſtand diſmiſſed; but with directions, that this ſhould be no Preſident.**

The

The Lord Keeper.
Juſtice Twiſden.
Juſtice Wyld.

Pheaſant *and others, Executors of* Walter Pheaſant, *againſt* Ann Pheaſant, *the Relict of* Walter Pheaſant, *the Mayor and Commonalty of* London, *and the Chamberlain.* July 4.

WAlter Pheaſant having taken to Wife the Defendant Ann, who was an Orphan, and had her Portion in the Chamber of London, after his Marriage took out 40 l. thereof, and by Will gives his ſaid Wife her Portion in the Chamber of London, being 2800 l. and other things to the value of 1000 l. on Condition ſhe renounce her Dower. She accepts this Legacy before and after her Husbands death. The Bill was to perform the Will and to renounce and releaſe her Dower. She hath a croſs Bill for her Portion in the Chamber of London againſt the Executors of her Husband, the Mayor and Commonalty and Chamberlain, and inſiſts that her Portion belongs to her in regard the Security was unaltered by her Husband in his life time, and ſo was as much as if it were a Debt due to her by Bond, and ſought to recover her Dower beſides.

For the Executors it was inſiſted, that the Monies in the Chamber of London is not there as a Common Debt, but veſts in the Husband by Marriage, it being only depoſited to remain there till the Orphan comes of Age, which ſhe attained during the Coverture. And it was alſo inſiſted, that the receiving of 40 l. out of it is an alteration of the property, and owning of the Husbands Right to the whole; and that however ſhe was concluded by the acceptance of her Legacy in lieu of her Dower. And it was ſaid that the Mayor and Chamberlain have only the Cuſtody of the Child, but not the Property of her Mony, but that is in cuſtodia Legis until ſhe comes of Age, and is only depoſitum, and not debitum in the mean time; and it would be inconvenient if the property of the

the Portion did not vest in the Husband by Marriage, for by the Marriage the Woman becomes dowable.

The Portion of an Orphan in the Chamber of *London* is of such a nature, that if the Husband die without altering the Property, his Widow, and not his Executors shall have it.

The acceptance of a collateral satisfaction for Dower no Bar of Dower.

The Lord Keeper conceived the Mony in the Chamber of London is a Debt, for the Chamber pays Interest for it, and if so, her acceptance of the matters devised to her will not bar her Dower, according to Vernons Case, 4 Rep. The acceptance of a collateral satisfaction is no Bar in a Writ of Dower; and so conceived Ann Pheasant is intituled to the Mony in the Chamber of London, but said he would consider of it.

And 30 Octob. 1670. for the Executors of the Husband it was insisted, that the Mayor and Commonalty have but the Custody of the Body and Goods of the Orphan, New Entries 346. And so the Property is in the Orphan; and the Orphan hath in truth a legal possession, the Chamberlain being in the nature of a Servant to the Orphan, and Possession of the Servant is Possession of the Master, 1 Cro. 37. So that by the Marriage this Mony is the Husbands. As if an Infant Feme bring Mony into this Court, and marries, and dies, the Property is in the Infant, and by Marriage becomes the Husbands. But it was answered, that was not like the principal Case; for here the Chamberlain pays Interest, &c. but no Interest is payable for Mony in Court; and the Property here is in the Infant. And so all agreed the Monies belong to the Widow, and not to the Executors.

D E

DE
Term. Sanct. Mich.
Anno Regis 22 Car. II.
IN
CANCELLARIA.

The Lord Keeper.

Tall *against* Ryland. October 13.

On a Demurrer.

THE Plaintiff and Defendant were Fishmongers, and had contiguous Shops; and Differences having been between them they were made Freinds, and by that Mediation the Plaintiff was to give, and did give the Defendant a Bond of 20 l. penalty, conditioned to behave himself civilly and like a good Neighbour to the Defendant, and not to disparage his Goods. The Plaintiff afterwards asked the Defendants Customer, whilst cheapning a parcel of Flounders, why he would buy of the Defendant, and told him those Fish stunck, and so the Defendant lost that Customer; and the Defendant having sued the Bond and assigned that for breach, had a Verdict. And to be relieved against that Verdict and the Penalty of the Bond was the Prayer of the Bill, which alledged that the Damage was not considerable nor valuable, and therefore the Plaintiff ought to be relieved against the Verdict for the Penalty.

The

No Relief in Equity againſt a Bond not to diſparage another Mans Goods.

The Defendant demurred, for that the Bond was not conditioned for payment of Mony or performance of Covenants, or for any matter for which Damages in an Action of Debt, Covenant or any other Action was recoverable, nor was there any way to meaſure the Damages but by the Penalty.

And the Bond being to preſerve Amity and Neighbourly Freindſhip, for the breach of which the Plaintiff did ſubmit to pay that Penalty, and there can be no Tryal had to meaſure the Damages for breach of the Condition, other than the Parties have ſubmitted to.

No Relief to be given againſt a penal Bond, where there is no meaſure to aſcertain the Damages for the Breach.

His Lordſhip declared, That as this Caſe was, the Penalty being but 20 l. he did not think fit to put the Defendant to anſwer, for that the Coſts of Suit here and at Law would exceed the Penalty, and ſo the Demurrer was allowed. But his Lordſhip declared this was not to be a Preſident in the Caſe of a Bond of 100 l. or the like; and though the Demurrer was allowed, the Defendant was to have no Coſts.

The Lord Keeper.

Palmer *againſt* Whettenhal. October 13.

Upon a Demurrer.

THE Bill was, That the Plaintiffs Brother was ſeized in Fee of a Rent of 7 l. per annum, and had the ſame paid him by the Owner of the Lands out of which this Rent iſſued during his Life, and that by his death this Rent deſcended on the Plaintiff as Heir, and that the Owners of the Land did pay the Rent to the Plaintiff till 1641. and there had been ſeveral Conveyances made of the Land in the late Troubles, and ſo no Rent paid ſince 1641. and that the Lands were now come to the Defendant, and ſo the Bill prayed that he might be decreed to pay the Rent and Arrears.

The Defendant ſaid he did not know any ſuch Rent was iſſuing out of the ſaid Lands, and that he and thoſe under whom he claims, had enjoyed thoſe Lands thirty ſeveral years under divers Purchaſes, without any demand of the Rent that he knew of, till the Bill, and demurred.

For

For that the Bill sought to subject his person (which was not to be liable at Law) to pay the Rent and Arrears, and for that it having been so long unpaid, it was to be presumed the Rent was extinguished. And however it appearing by the Bill, that the Plaintiff had Seisin, he might bring his Assize at Law; and if that had not been a Seisin, it was said that all the Relief this Court would have given, would be but to give Seisin. And on Debate the Demurrer was allowed.

The person is not to be subjected in Equity to a Rent.

No Relief in Equity for a Rent of which the Plaintiff hath Seisin.

The Lord Keeper.
The Master of the Rolls.
Justice Rainsford.
Justice Windham.

Hide *against* Pettit. October 25.

THE Parties in Court signed an Order by consent to refer their matters to Arbitrators finally to determine, and their Award to be final, and stand ratified by Decree without any Appeal. One of the Parties after that he had attended the Reference, and found they inclined to order him to pay the other Party a Sum of Mony, countermands the Submission.

And the first Question was, Whether this Submission was revoakable?

Of which the Lord Keeper at first seemed to doubt; but on Argument and producing a President in point, Norton against Rowland, 8 July 1664. and 10th of the same July, the Judges were both of Opinion, that there could be no Submission to an Award in Law or Equity, but what was revoakable, and that nothing under a Legislative Power can make such a Submission irrevokable, which in its nature is revoakable. But it was an abuse to the Court, as it was conceived, to revoke it, for which the Court might justly lay the Party by the Heels. And so in this Cause an Attachment was awarded against him nisi causa. In this Case it was observed, that whereas formerly the course was upon Submission to award an Attachment against the Party failing, yet of late the Courts of Law do refuse to grant Attachments in such Cases,

A Submission to an Award by consent of Parties by order of this Court is revoakable.

Attachment against a Party revoking a Submission to an Award by Order by Consent.

but leaves the Party to his Action, the Rule being Evidence of his Submiſſion.

In the principal Caſe the Arbitrators had determined ſome Matters, and had left others undetermined, and ſubmitted thoſe other Matters to the Court: And whether this was therefore ſuch an Award (being but part of the Matters referred) as was fit for the Court to decree, was the Queſtion. And though at Law an Award may be good, though but for part of the Matters referred, unleſs the Submiſſion be conditional to make an Award on the Premiſſes; yet Equity, as it was inſiſted, ought not to decree ſuch an Award, unleſs it be of all Matters referred. And ſo were both the Judges of that Opinion; for its not a determination purſuant to the Reference, and ſo the Award was ſet aſide.

Equity will not decree an Award unleſs it be of all Matters referred.

The Lord Keeper.
Juſtice Windham.

Squib *and* Bradſhaw *againſt* Bolton. Octob. 25.

THE Queſtion was, If upon a Submiſſion by Order of Court by Conſent to Arbitrators, and the Award to be final and ſtand decreed, any Exceptions lie to ſuch an Award as to a Report. And whether, if it were an unjuſt Award, the Court ought to decree it; and whether the Court ſhould examine the Juſtice of the Award, and the Merits of it, which the Maſter of the Rolls had taken upon him to do in this Cauſe, by ordering the Arbitrators to certifie the Court whether they had conſidered of certain particulars, which the Party diſliking the Award, ſaid, they had not, which were in iſſue in the Cauſe. And upon an Appeal from the Maſter of the Rolls Order, it was now ordered that the Parties ſhould attend the Maſter of the Rolls, and ſatisfie him in what he doubted. So here the Court examined the Juſtice of the Award which in this Cauſe, and the next precedent, the Court did think upon Circumſtances, might be done, and that if an unjuſt Award was deſired to be confirmed by Decree, and the Court informed of it, the Court ought not to decree it.

Whether Exceptions are to be admitted to an Award on a Reference by Conſent.

The

The Lord Keeper.

Buſh *againſt* Riſhley. October 31.

THE Bill was to have a Rate Tythe ſetled by Decrée againſt the Impropriator, and prevent multiplicity of Suits.

And for the Plaintiffs it was prayed, that the Court would either decrée that the Plaintiffs ſhould hold their Lands under that Modus decimandi, which at a Tryal at Law pending this Suit was found by Verdict, or that the Court would direct another Tryal to try the verity of the Modus, and reſerve the Cauſe till after the ſecond Tryal (if the Court were not ſatisfied with one Verdict) It being inſiſted, that after ſuch Tythe Rate had been aſcertained by two Verdicts, the Court ought to decrée an Enjoyment of the Lands, for which the Modus was payable under that Rate-Tythe, and diſchage the Tythe in kind; and it was compared to the Caſe of Copyholders, that have their Fines and Services aſcertained by the aid of this Court, by directing of Tryals for that purpoſe firſt, and after decrééing according to the Verdicts on ſuch Tryals.

But for the Defendant it was inſiſted, that this Court had not at any time decreed a Modus decimandi, and that Tythes were payable in kind by Common Right.

And though it was inſiſted for the Plaintiffs that it was frequent in the Exchequer to decrée a Rate-Tythe, the Lord Keeper did not think fit to decrée in ſuch a Caſe, but ordered two Depoſitions to be made uſe of at Law, as occaſion ſerved. And diſmiſt the Bill.

A Rate-Tythe is not to be decreed in Chancery.

The Lord Keeper.
Juſtice Wyld.

Bagg *againſt* Foſter.

On a Demurrer.

William Buſhel on his Marriage with Dorcas his Wife, enters into a Bond of 1000 l. to Truſtées to her uſe, in Auguſt 1648. conditioned to be void, if he did not within two Months ſettle the Lands in Queſtion on thoſe Truſtées, to the uſe of himſelf and Dorcas, and their Heirs in November next. After William Buſhel covenanted with one of the Truſtées to ſtand ſeized of thoſe Lands to the uſe of himſelf for Life, Remainder to Dorcas for Life, Remainder to his firſt and tenth Son in Tayl, Remainder to his own right Heirs. William Buſhel dies without Iſſue; Dorcas ſurvives many years, and marries with one Bagg, by whom ſhe hath Iſſue the Plaintiff, her Son and Heir, an Infant. And now in his behalf the Bill is brought againſt the Defendant, who claims under the Heir of William Buſhel, to inforce a Conveyance according to the Condition of the Bond.

For the Defendant it was demurred unto, for that the Bond was in 1648. and William Buſhel in November after made a Settlement, ut ſupra, to which one of the Truſtées was a Party. And for that there is no Iſſue of the Plaintiffs Mother, and William Buſhel, and the Plaintiff, a mère Stranger to William Buſhel, being the Child of Dorcas by another Husband, and that the Conveyance, ut ſupra, ought reaſonably to be intended for a performance of the Marriage Agrément, and at leaſt that the Plaintiff ought not to have any Relief in Equity, it not appearing that any Poſſeſſion hath gone according to the Bond, or that any Relief was till now ſought, though it be one and twenty years ſince.

On the Argument of the Demurrer it was for the Defendant inſiſted, that there being no Agrément but what was in the Condition of the Bond, and no Articles or Agrément beſides, and the Bond two and twenty years old, and ſuch Settlement, ut ſupra, made unto one of the Obligées

Obligée's of the ſame Land mentioned in the Condition, though not to the ſame Uſes, and Dorcas never queſtioning it in her Life, and the Agreement being ſecured by Penalty, which was relyed upon, that this Caſe did differ much from an Agreement by Articles to ſettle Lands, for here the Party reſted on a Penalty, and there was no reaſon to turn ſuch an Agreement as this was, into a collateral Execution by decreeing the Land, which the Court did conceive reaſonable, and ſo allowed the Demurrer.

An Agreement contained in the Condition of a Bond ſhall not be turned into a collateral Execution by Decree of the Land.

The Lord Keeper.

Withers *againſt* Kelſea. November 16.

A Factor gives his Daughter 300 l. Portion charged on Lands, and dies: The Daughter marries and hath a Joynture ſettled on her by her Husband, and hath no other Portion but the 300 l. The Husband dies before any part of the 300 l. was paid. The Plaintiff is the Executor of the Husband, and ſues the Widow and the Heir of the Lands for the 300 l.

The Queſtion was, Who ſhould have the 300 l. whether the Executor of the Husband, or the Wife?

For the Executor of the Husband it was inſiſted, that he having ſettled a Joynture in conſideration of the Portion, which Joynture the Wife enjoyed, that thereby in Equity the Right of the Portion was ſo veſted in him, that the Executor, and not the Wife ought to enjoy it.

Where the Portion in Mony ſhall go to the Executors of the Husband, and not the Wife ſurviving.

The Lord Keeper declared, That this 300 l. being to go out of the Rent of the Lands, and charged upon Lands, was not in the nature of a thing in Action, but of a Rent, and given to the Husband by the Marriage: And ſo decreed for the Plaintiff the Executor. Sed quære, for a Rent belonging to a Feme doth, in caſe ſhe ſurvive the Husband, belong to the Wife, and ſo the Arrears that incur during the Coverture, 1 Inſt. 351.

The

The Lord Keeper.

Justice { Twisden, Wyld, Rainsford, Windham.

Holt *against* Holt. December 7.

ALexander Holt a Citizen of London, seized and possessed of Houses in London, and elsewhere of a publick Title, and possessed of Houses in St. Martins in the Fields by Lease from the Church of Westminster, 18 May 1656. by his Will in Writing gave 10000 l. to his Daughters, being his only Children, and Orphans, to be paid out of his Estate Real and Personal at their Age of one and twenty, or Marriages (which first shall happen) and made Alexander Holt his Nephew, and others his Executors, and dyed. The Executors proved the Will; and the Executor Alexander and others, as his Sureties, in 1658. entred into a Recognizance to the Chamberlain of London, for the payment of the 10000 l. (which by the Will was first to be paid) before any others should have any benefit of his Lands, &c.

By the Restauration of the King the Lands of the publick Title reverted to the right Owners. And by the Fire in London the Houses of the Testator in London were burnt down, so that it was to be doubted his whole Estate would not amount to the 10000 l.

And the first Question was, Whether the Recognizance should in Equity extend any further than only to make good to the Orphans so much as the Testators Estate considering the Losses aforesaid, and as it now was really worth?

And it was insisted by the Counsel of the Sureties of the Executors, that it ought not to be binding any farther in Equity. For that if the Chamber of London had taken the Estate of the Testator into their Hands, it would have been in no better plight than now it is. And the intention of the Security was but that the Executor should not misimploy or waste the Estate, which (as it was declared) they had not done, but were ready to account for what they had already received.

The

The Court as to that Point were all of one uniform Opinion, that the Recognizance should be made use of no further than to make good the value of the Testators Estate over and above the Losses by Fire, and the Kings Return, and decreed the same accordingly.

The Condition of a Recognizance qualified in Equity according to the Equity of the Matter before the Recognizance was given.

Albeit it was insisted for the Orphans, that the Condition of the Recognizance was generally for payment of the 10000 l. (and so it was) And the Executor Alexander had thereupon taken upon himself the absolute Ownership of the Estate, and managed it as his own. And that now a Loss had befallen the Estate, the Orphans ought not to be carried back to the Account of the Testators Estate, for that by the Recognizance the Orphans Portions were now become Debts. Nevertheless for the Reasons before it was decreed as aforesaid.

A Condition of a Recognizance for payment of Mony generally, qualified in Equity to the original Equity.

And the next Question was, Whether the Lease held of the Church of Westminster, which had been renewed by the Executors, and a Fine paid, and new Houses built thereupon by the Executors, should be taken to be part of the Testators Estate?

Where a Lease renewed by an Executor shall be lyable to a Legacy of the Testators.

For the Executors it was insisted, They were not Executors in Trust for the Orphans, but were to pay them out of the Estate 10000 l. only; and the Estate was looked upon at the Testators making his Will, and really was then and before the said Losses of much greater value, and a benefit was intended the Executor Alexander by the Testator. But the Court did unanimously agree, That the Daughters should have the benefit of the renewed Lease paying the Fine and other Charges of improving. And so it was decreed accordingly. But this must be understood so far only as to the compleating the Orphans 10000 l.

If a Trustee of a Term surrender and take a further Term, that shall be for the benefit of *Cestuy que Trust*.

But it was agreed by the whole Court, that in case of an Executorship in Trust, the renewal of such a Lease shall go to the benefit of the Cestuy que Trust.

DE
Term. Sanct. Hill.

Anno Regis 22 & 23 Car. II.

IN
CANCELLARIA.

Judge Moreton.

Verhorn *againſt* Brewine *and others.* Jan. 18.

THE Plaintiff ſued as Adminiſtrator to have a diſcovery and an Account of the Eſtate of his Inteſtate.

The Defendant pleaded that the ſuppoſed Inteſtate made a Nuncupative Will, and another perſon, who he named in his Plea, his Executor; and inſiſted he was not anſwerable or accountable to the Plaintiff, nor to any other but the Executor.

A Nuncupative Will is not pleadable in any Court before Probate.

On debate it was ruled, that before Probate of the nuncupative Will (which is only to be proved in the Eccleſiaſtical Court) it is not pleadable in any Court againſt an Adminiſtrator; and ſo the Plea was over-ruled.

William

William Barber *againſt* William Took *and* Charles Lindſey. January 25.

MAthew Lindſey was ſeiſed in Fée of the Lands in Queſtion, and by Will in Writing deviſeth them to the Plaintiff in Fée, and after mortgageth thoſe Lands to the Defendant Took for years, and dies, the Defendant Charles Lindſey being his Couſin and Heir.

And the Queſtion was, Who ſhould have the Redemption, the Plaintiff Barber or the Heir?

A Conveyance for years is not a Revocation of a Deviſe in Fee, but *pro tanto* only.

For the Plaintiff it was inſiſted, That the Deviſe to him, being of the Fée, and the Mortgage after being but a Term for years, that was a Revocation but pro tanto, and not pro toto, and the Deviſe did notwithſtanding paſs the Reverſion, and conſequently the Equity of Redemption.

And of that Opinion was the Judge. But the Defendant, the Heirs Counſel, inſiſted, that there was an actual Revocation of the whole Will. It was directed to be tried whether there was an actual and total Revocation.

The Lord Keeper.

The Poor of the Pariſh of St. Dunſtan, *by Engliſh Bill, againſt* Beauchamp. Febr. 6.

A Decrée having been made by Commiſſioners upon the Statute of Charitable Uſes, thoſe for whom the Decrée was brought an Original Bill, ſetting forth that the Defendant to the Decrée threatned, when the Witneſſes were dead, they would except to the Decrée, and ſo prayed that the Defendant might ſhew Cauſe, why the Decrée ſhould not be confirmed. The Defendant by Anſwer ſubmitting to the Decrée, it was decreed by the Lord Keeper, That the Decrée of the Commiſſioners ſhould be confirmed.

A Decree by Commiſſioners for Charitable Uſes, confirmed by original Bill.

Quod nota, and Quære, What need of ſuch a Bill; for that when a Decrée is made by Commiſſioners, the Courſe is to return it into the Petty-Bag, and then to ſerve the Defendant with a Writ of Execution, upon which

The courſe of Proceedings in Petty Bag on Decrees of Charitable Uſes.

which Service the Defendant may file Exceptions, and pray to stay Proceedings till they be heard. But if the Defendants do not then except, but submit to the Decree, it seems reasonable they should be concluded thereby, and not be admitted to Exceptions after.

The Master of the Rolls.

Dakins *and his Wife against* Berisford. Febr. 6.

LEases were devised to the Defendant by his eldest Brother, to be sold for several purposes, and amongst other, in Trust that the Defendant should purchase in his own Name an Annuity of 80 l. per annum, for the Life of the Plaintiffs Wife, and pay the same to her and her Assigns. The Bill was to inforce the payment of this Annuity.

The Defendant insisted by Answer, that he had constantly paid the Annuity to the Plaintiffs Wife (from whom the Plaintiff lived apart) and that the Bill was against her Consent, and that it was the intent of the Donor to be for her only benefit, the Will being, that he should buy in his own Name the Annuity in Trust for the Plaintiffs Wife (who is the Defendants Mother) and her Assigns, and so insisted, that the Plaintiff not inhabiting with her, he ought not to be put to pay the Annuity to him. It appeared by Proofs that the Cause of the Plaintiffs first absenting himself from his Wife was for fear of Debts, and that he had since solicited her by Letter to co-habit, but she refused.

A Trust for the benefit of the Wife without negative words doth not exclude the Husband.

The Master of the Rolls declared, That in this Case the Husband was the Assignée of the Wife, and that there being no negative Words by the Will to exclude the Husband from the Annuity, he could not exclude him; and so decreed the Defendant to pay all the Arrears of the Annuity since the Bill exhibited, and the growing Annuity for the future to the Plaintiff the Husband.

The

The Lord Keeper.
Justice Twisden.
Justice Moreton.

Smith *and others against* Stowel *and others.*
February 17.

THERE was a disposition in 1579 (which was before the Statute of 43 Eliz. for Charitable Uses) to a Charity, part of the Lands were of a defective Title, and the whole Disposition void, being before the Statute. Yet an Agreement was made between the Parties interessed and the Trustee, for the setling the Use designed, so much as was proportionable in value to what the Donor had to give, and this was setled accordingly before the Statute, and long Leases were let of the Ground to divers Tenants, at small Rents, to build, who had thereby improved that Ground that was but 20 l. per annum to 150 l. per annum.

A Decree was made by the Commissioners for avoiding the Tenants Leases, they not being in strictness of Law good.

An Appointment to a Charity that was precedent to the Statute of 43 *Eliz.* and so void, is made good by the Statute.

Upon Exceptions to that Decree, it was declared by the Court, that though the Charity was precedent to the Statute, yet the Statute subsequent had a retrospect and would make it a good appointment, that was not so before (but void.) And it was declared, that so as the Ter-tenants be no losers they ought not to be gainers in the Case of Charity: And so ordered, that during the Ter-tenants Leases there should be an Augmentation of 50 l. per annum allowed by them in proportion to the Poor.

Ter-Tenants Lessees of a Charity ordered to augment their Rent.

The Lord Keeper.

Juſtice { Twiſden, Wyld, Rainsford, Windham.

Henry North *Eſquire againſt* Charles Crompton *Eſquire.* March 25.

KAtharine Crompton Spinſter, ſeized in Fee of the the Lands in Queſtion, by her Will in Writing the 21ſt of January 1669. expreſſeth thus: I ordain and conſtitute *Henry North* Eſquire, (which is the Plaintiff) to be mine Executor of this my laſt Will. And I do give all my Eſtate, real and perſonal, to diſpoſe of for the payment of all my juſt Debts; and for the performing of all ſuch Legacies as I have herein, or by the Codicil annexed, bequeathed unto my Executor abovenamed; and gives ſeveral Legacies in Money, and amongſt others 200 l. to the Defendant her Uncle, who is Heir at Law; and a Legacy of 500 l. being omitted to the Plaintiffs Siſter, it was inſerted in a Codicil.

Mr. North's Bill was to prove this Will per Teſtes.

Mr. Crompton's Bill was to be relieved upon the Truſt of the Deviſe, as he ſuppoſed, after the Debts and Legacies paid, and to diſcover what the Debts were.

Theſe Cauſes came firſt to be heard 8 Febr. 1670. before the Lord Keeper and Baron Wyndham, and then theſe two Queſtions were ſtirred by the Court.

1. Whether this were a Deviſe of Lands in Fee?

2. Whether Mr. North (the Plaintiff Crompton claiming by an implyed Truſt) after Debts and Legacies paid, might not be admitted to aver againſt that Implication?

Of both theſe Points the Court took time to conſider.

3 March 1670. The Cauſe being heard again before the Lord Keeper and Mr. Baron Wyndham, they declared they were both of Opinion, That it was a Deviſe of

of the Lands in Fee, and then they doubted whether a Truſt be created for the Heir, of the Surplus. And another Queſtion they made, If a Truſt, whether an Averment did not lie for Mr. North, it being but an implyed Truſt, and not within the Statute of H. 8. Of Wills.

A Deviſe of all Eſtate real and perſonal for payment of Debts, is a Deviſe in Fee.

No implyed Truſt of the Surplus for the Heir.

And 25 March 1671. the Lord Keeper and the four Judges all agreed, That a Fee paſſeth by the Deviſe. And as to the implyed Truſt all conceived there was not any implied Truſt for the Heir for the Surplus; for if there were, the Deviſee had no benefit; and to no purpoſe was the Deviſe of the 200 l. to the Heir, if ſhe had intended the Surplus to the Heir.

DE
Termino Paſchæ
Anno Regis 23 Car. II.
IN
CANCELLARIA.

The Lord Keeper.

Thomas Martin *Clerk*, *againſt* Douch *and* Overton.

A Sum of Mony given to one to diſpoſe as the Teſtator ſhall appoint by a Note, who dies without ſuch appointment, a good bequeſt to the Party.

ONE Foſter deviſeth to the Plaintiff in theſe Words, *Item*, I give to my Couſin *Thomas Martin* Clerk, late Miniſter of *Houghton* in *Northamptonſhire*, and living thereabouts, I do order 40 *l.* to be paid him to be diſpoſed of for certain Uſes, which I ſhall in a private Note acquaint him with, and gave him no Note or direction how to diſpoſe of it, but died, the Defendants being his Executors. And whether the Plaintiff ſhould have the 40 l. was the Queſtion.

The Maſter of the Rolls was of Opinion the Plaintiff ſhould have the 40 l. for that the Teſtator did not intend it ſhould come to his Executors, but had by his Will given it away from them; and ſo he decreed the Defendant to pay the 40 l. to the Plaintiff.

The

The Lord Keeper.

Pate *againſt* Hatton *or* Hutton. May 15.

A Citizen and Freeman of London deviſeth to his Son a groſs Sum, which did exceed the Cuſtomary part, and deviſeth that if his Son dye before he attain one and twenty, that Sum over to another.

The Queſtion was, If the Deviſe over was good?

And it was adjudged, and ſo decreed by the Lord Keeper, That the Deviſe over for ſo much as was the Cuſtomary part, was void, and that the Orphan dying within Age, his Adminiſtrator was intituled to ſo much as was the Cuſtomary part, and the Surplus of that groſs Sum to go to thoſe to whom it was deviſed over.

A Citizen in *London* cannot deviſe his Childs part over to another, in caſe the Child die in Minority.

The Lord Keeper.

Lambert *againſt* Bainton. May 15.

MR. Dunch in 1646. had conveyed the Lands in Queſtion to Sir Edward Bainton in Fee, in Truſt, to ſell all, or any part of it for payment of his Debts. Sir Edward Bainton had conveyed his Lands to his Son, and was dead. Dunch being dead and the Plaintiff being intituled to the benefit of the Truſt after the Debts paid, brought the Bill to avoid the Conveyance made by Sir Edward Bainton to his Son, and ſo have a Reconveyance.

For the Defendant it was inſiſted, That though it was a Truſt in Sir Edward, yet Sir Edward had paid the Debts to the value of the Eſtate, and was thereby become a Purchaſer as much as if he had ſold the Lands to another.

Where a Truſtee for Sale of Lands for payment of Debts pays to the value of the Lands, thereby he becomes a Purchaſer himſelf.

The Lord Keeper declared, That if Sir Edward Bainton had paid to the value of the Lands, he was a Purchaſer; but it not appearing what he had paid when he made

made the Settlement more than he received, referred it to a Maſter to examine, and declared, that the Defendant, as to ſo much as Sir Edward had then diſburſed, ſhould be taken as Purchaſers, becauſe Sir Edward might ſell all or any part; and ſo the Defendant is a Purchaſer pro tanto.

The Lord Keeper.

William Vanbrough *againſt* William Cock *and his Wife, and* Peter Drybutter. May 17.

About ſeventeen years ſince, Cornelius Beard bequeaths to his Siſter, then in her Infancy, 250 l. to be paid at Marriage, or one and twenty years, and made one Andrew Drybutter and the Plaintiff Executors, and dyed, leaving his Siſter young. Both the Executors made Probate of the Will, but the Plaintiff at the deſire of the Siſters Friends did forbear to meddle with the Teſtators Eſtate, and left it wholly to Andrew Drybutter, the other Executor, who only did act in it. Andrew dying he made Elizabeth his Wife, his Executrix. She poſſeſſed what there was of the firſt Teſtators Eſtate, and paid to the Defendant Cock's Wife, then the Wife of one Earl, 100 l. part of the 250 l. and the ſaid Elizabeth Drybutter kept all the firſt Teſtators Books and Papers, and that by the deſire of the ſaid Legatee, and ſhe dying ſhe made the Defendant Peter Drybutter her Executor. The Defendant, Cock's Wife, libelled in the Spiritual Court againſt the Plaintiff for her 250 l. and hath Sentence there againſt him for the whole, hanging this Suit, and yet hath by Anſwer confeſt 100 l. part of the 250 l. to be paid.

The Scope of the Bill was to be relieved againſt the Spiritual Court, ſetting forth that by that Law the Plaintiff having joyned in the Probate would be charged with the Legacy though he did not meddle with the Eſtate; and that it was againſt Equity to charge one Executor with the Receipts of another. And the Bill charged that the other Defendant Drybutter had Aſſets both of Andrew Drybutter and Elizabeth Drybutters Eſtate, and if they had not paid as far as they had Aſſets of Beard's Eſtate the

the Defendant Drybutter, and not the Plaintiff ought to pay what was unpaid of the 250 l. Legacy.

The Defendant Drybutter confeſſed he had Aſſets of the ſaid Andrew and Elizabeth, his Father and Mothers reſpective Eſtates, and inſiſted that they had fully adminiſtred Beard's Eſtate, and the Queſtion was what Relief they ought to give the Plaintiff againſt the Sentence in the Spiritual Court.

The Lord Keeper declared, That the Judgments of the Eccleſiaſtical Court were as ſubject to the Equity of this Court, as Judgments in the Common Law Courts; and howbeit at Law one Executor is not lyable to the Devaſtavit of another, yet in the Eccleſiaſtical Courts, and by their Law, if an Executor prove the Will, they will charge him, though he do no further intermeddle to pay the Legacies: But Quære if that be not only where there is a failer of bringing an Inventory, Doctor & Stud. 67. And the Lord Keeper declared the Plaintiff is without Relief by Appeal from the Sentence, becauſe the Judges Delegate muſt judge according to that Law, and ſo inclined to relieve the Plaintiff, but took time to adviſe. Whether a Sentence in a Spiritual Court be ſubject to Examination in Equity.

Doctor & Student ut ſupra, A Law grounded on a Preſumption, if the Preſumption be untrue is not to be holden in Conſcience; for Stabitur Præſumptio donec probetur in contrarium. Preſumption.

Sir Ralph Bovey *againſt* Skipwich. May 25.

IN 1651. Sir Francis Drake made the Plaintiff a Security out of the Manor and Rectory of Waltham upon Thames. Afterwards in 1656. Drake made the Defendant a Security for Mony out of the Rectory only (the Defendant having no Notice then of the Plaintiffs Security which was for Mony alſo.) Afterwards the Defendant hearing of the Plaintiffs Security, buys in a Security precedent to the Plaintiffs, which one Beddingfield had both upon the Manor and Rectory. Mortgage. *Antea.*

1. Queſtion was, Whether the Plaintiff ſhould be admitted to redeem Beddingfield's Security without paying off what was due to Skipwith? And it was ruled he ſhould not. Vide Marſh and Lees Caſe. A puiſne Mortgagee buying in a precedent Incumbrance, ſhall hold againſt a middle Mortgagee, till both are ſatisfied.

Where a Mortgagee buying in a precedent Security of the Lands in his Mortgage and other Lands, ſhall hold all againſt a middle Mortgagee of all thoſe Lands, till all due to him on both Securities be ſatisfied.

2. Queſtion was, Whether inaſmuch as the Defendants Security was only out of the Rectory, and the Security he bought in from Beddingfield was of both the Manor and Rectory, the Defendant ſhould make uſe of Beddingfield's Security as to the Manor after that by the Profits of the Manor and Rectory Beddingfild's Debt was ſatisfied? And whether then the Plaintiff ſhould not then be admitted to enjoy the Manor, his Security being as well of the Manor as the Rectory, and the Defendant to hold only the Rectory till he was ſatisfied?

Wyld and Twiſden were of Opinion, That after Skipwith had received what was due on Beddingfield's Security he ſhould receive no more Profits of the Manor, but the Plaintiff to be let in to receive them, and the Defendant only to make uſe of Beddingfield's Security as to the Rectory to protect his Security of the Rectory. But it was reſolved and ruled, that the Defendant ſhould hold both the Manor and Rectory againſt the Plaintiff till all due to him on both the Securities was paid him. Quære tamen.

The Lord Keeper.

Rich *againſt* Sydenham. May 26.

Where the Contract is intire, and inequitable Equity will not apportion Relief for part.

THE Plaintiff upon the Loan of 90 l. had gotten a Bond from the Defendant of 1600 l. for payment of 800 l. and Judgment thereupon. The Defendant in the Right of his Wife was entituled to certain Lands that were eſtated in other perſons in Law in Truſt for her.

The Bill was to have thoſe Lands ſubjected to the Plaintiffs ſatisfaction here, inaſmuch as the Defendant was intituled to the Truſt in the Right of his Wife.

But the Security being gotten from the Defendant when he was drunk, the Lord Keeper would not give the Plaintiff any Relief in Equity, not ſo much as for the Principal he had really lent; and ſo the Bill was diſmiſt.

The

The Lord Keeper.

The Mayor and Aldermen of London, *and* Byfield *an Infant againſt* Slaughter, *the Executors of the Plaintiffs Father.* May 27.

THE Bill was to bring in one that lived out of the Juriſdiction of London, to come and give Security to the City for the Orphans Portion, according to the Cuſtom of the City.

The Defendant by his Anſwer offers to do as this Court ſhould direct, but being no Freeman, would not be ſubject to the City Orders.

The Recorder. This Court uſeth to aſſiſt the City in ſuch like Caſes, and on Petition uſeth to grant Subpœna's to perſons to appear before the Mayor in his Court, and cited a Preſident 28 Febr. 3 Jac. Fiſh and Cole's Caſe, of a Subpœna out of the Subpœna Office. The Chancery aſſiſtant to the Juriſdiction of Mayors Court.

Maynard for the Defendant. This Cuſtom concerns the Country as well as the City, and muſt be tryed by Verdict; and its inconvenient for Country Gentlemen to be put to give Security to the Orphans Court by Recognizance.

The Lord Keeper decreed the Plaintiffs to try the Cuſtom.

DE
Term. Sanct. Trin.
Anno Regis 23 Car. II.
IN
CANCELLARIA.

The Lord Keeper.

Doctor Salmon *againſt the* Hamborough *Company by the Name of the Governour, Aſſiſtants and Fellowſhip of Merchant Adventurers of* England, *and divers particular Members of that Company by Name in their natural Capacities.*

A courſe to recover a Debt from a Corporation that hath nothing whereby it may be ſummoned.

THE Bill charged, that the Company were incorporated prout per Letters Patent, and had power to make By-Laws, and to aſſeſs Rates upon Cloaths (which was the Commodity they dealt in) and by Poll upon every Member to defray the neceſſary Charge of the Company, and that the Company had impoſed Rates accordingly, as namely, 4 s. 6 d. upon every white Cloath exported, and divers others, and thereby raiſed 8000 l. per annum towards the ſupport of the Common Charge of the Company, and that they had thereby got great Credit, and borrowed great Sums of Mony by their Common Seal, and particularly the Plaintiff lent 2000 l. upon that Security many years ſince. And the Bill did ſet forth divers advantges they had in

in Trade by being Members of this Corporation, which others wanted. And the Bill did charge, That the Company having no Common Stock, the Plaintiff had no remedy at Law for his Debt, but did charge that their usage had been to make Taxes, and levy Actions upon the Members and their Goods, to bear the Charge of their Company to pay their Debts, and did complain that they now did refuse to execute that power, and did particularly complain against divers of the Members by Name, that they did refuse to meet and lay Taxes, and that they did pretend want of power by their Charter to lay such Taxes, whereas they had formerly exercised Power, and thereby gained Credit; whereupon the Plaintiff lent them 2000 l. which was for the use and support of the Companies Charge, and so ought to be made good by them, and so prayed to be relieved.

Paschæ 1656. this Bill was filed, and the Company served with Process, but would not appear, they having nothing by which they may be distrained: But divers particular Members being served in their natural Capacities, did appear and demur, for that they were not in that capacity liable to the Plaintiffs demands. 10 May 1666. On the Argument the Demurrer was allowed, and the Bill dismist as to them, and that dismission enrolled, and thereupon a Petition of Appeal was preferred to the Lords in Parliament, admitting that in the ordinary course of Proceedings in Chancery that Court could not help the Plaintiff. But in Causes of this nature the Lords House had given special directions to the Chancery to relieve, and it had been accordingly so done, and produced two Presidents against Companies in London for that purpose. And to this Petition the Defendants particularly named did put in an Answer, Plea and Demurrer, and the Company, tho several times summoned, did not appear. And upon debate of the Matters before the Lords at the Bar of the Lords House 20 January 1670. this Order was made.

Where the Chancery (according to rule) cannot relieve in a just Cause, the Parliament will give special direction for relief.

The matter upon the Petition of Salmon, Dr. of Phisick, exhibited to the Lords Spiritual and Temporal in Parliament assembled, against the Governors, Assistants and Fellowship of the Merchant Adventurers of England, commonly called the Hamburgh Company, and Sir Charles Lloyd Baronet, Sir Anthony Bateman Knight, Thomas Smith, Richard Wyan, John Dogget, Henry Colliar, Henry Smith,

Smith, John Lethieulier, Chriſtopher Pack, George Wytham, and others, Members of the ſaid Company, and upon the Anſwer, Plea and Demurrer of the ſaid Rowland Wyan, John Dogget, Henry Collier and John Lethieulier put in to the ſaid Petition (the Governor, Aſſiſtants and Fellowſhips, tho ſeveral times ſummoned, not appearing) being heard at the Bar of this Houſe, in preſence of Councel learned on both ſides, the ſaid Petition being on Appeal made from a Diſmiſſion in the High Court of Chancery, and the Petitioners Bill there. Their Lordſhips on reading the ſaid Petition, the Anſwer, Plea and Demurrer thereto, and the ſaid Diſmiſſion, and the Charter by which the ſaid Governor and Fellowſhip are incorporated, and hearing what was alledged on both ſides, do order that the Diſmiſſion for ſo much as concerns the ſaid Company, be, and do ſtand reverſed, and that the Lord Chancellor or the Lord Keeper of the Great Seal of England for the time being, do retain the ſaid Bill. And that the ſaid Court of Chancery ſhall iſſue forth the uſual Proceſs of that Court, and if cauſe be, Proceſs of Diſtringas thereupon againſt the ſaid Corporation; provided the ſaid Proceſs be ſerved one month before the return thereof. And if upon return of the Proceſs, the ſaid Corporation ſhall not file an Appearance, or ſhall appear and not anſwer, the ſaid Bill ſhall be taken pro confeſſo, and a Decree ſhall thereupon paſs. But in caſe the ſaid Corporation ſhall appear and anſwer within the time aforeſaid, then the Court of Chancery ſhall proceed to examine what the Plaintiffs juſt Debt is, and ſhall decree the ſaid Company to pay ſo much Mony as the ſame ſhall appear to amount unto, with reaſonable Damages. And in caſe the Corporation ſhall not pay the Sum decreed within ninety days after the ſervice of the ſaid Decree upon their Governor, Deputy Governor, Treaſurer, Clerk or Secretary for the time being, then the Lords Spiritual and Temporal do farther order, adjudge and direct, that the Lord Chancellor or Lord Keeper for the time being ſhall order and decree that the Governor or Deputy Governor, and the twenty four Aſſiſtants of the ſaid Company, or ſo many of them as by the Tenor of their Charter do conſtitute a Quorum for the making of Leviations upon the Trade or Members of the ſaid Company for the uſe of the ſaid Company, ſhall within ſuch time as by the Lord Chancellor or Keeper ſhall be thought fit, make ſuch a Leviation

Leviation upon every Member of the said Company as is to be contributary to the Publick Charge, as shall be sufficient to satisfie the said Sum to be decreed to the Plaintiff in that Cause, and to collect and levy the same, and to pay it over to the Plaintiff as the Court shall direct. And such a Leviation is to be put in Writing and signed with the Hand of the Governor, Deputy Governor and Assistants of the aforesaid Company for the time being, and so many of them as by the Constitution of the said Charter do make a Quorum shall not make or return such Leviations, as aforesaid, the Lord Chancellor or Lord Keeper may issue Process of Contempt against them, as is usual against Persons in their natural Capacities. And if by the said time so to be limited by the said Court of Chancery the said Mony so to be assessed shall not be paid, then and from thenceforth every Person of the said Company upon such a Leviation shall be made to be liable in his Capacity to pay his quota or proportion assessed. And the Lord Chancellor or Lord Keeper is to order or decree, that such Process shall issue against any such Member so refusing or delaying to pay his quota or proportion as is usual against Persons charged by the Decree of the said Court for any Duty in their several Capacities. And if the Total so returned and filed with the Register shall not amount to so much as shall be sufficient to satisfie the Sum decreed, with respect had to such Person as shall make it appear that they are overcharged, or ought not to be charged at all, Then the said Lord Chancellor or Lord Keeper for the time being may from time to time order that a new Leviation be made and returned into the Registers of the Court of Chancery, of such Sum as shall be sufficient, by way of Supplement for that purpose, to the payment whereof every individual Person is to be bound in such manner as aforesaid.

6 March 1670. The Lord Keeper on a Motion grounded on the Lords, ordered that the Dismission stand reversed, and the Bill stand revived, and that Process and other Proceedings issue as is thereby directed, and the service thereby directed be sufficient.

Accordingly the Treasurer and Secretary were served with a Distringas against the Company, and Copies of the Lords Order. The Sheriff returned Nulla bona; and no Appearance is made.

5 July

5 July 1671. Ordered the Cause be put into the Paper to be heard, and notice to be given to the Treasurer, Clerk and Secretary.

Pro confesso. And now the 5th of July 1671. none appearing for the Defendants, the Court decreed the Bill to be taken pro confesso, and the Defendants to pay the Plaintiffs Debt, according to the Lords Order in Parliament.

The Lord Keeper.
Justice Wyld.
Baron Windham.

The Lord Cornbury *and Dame* Flora *his Wife, formerly the Lady* Backhouse, *against* Simon Middleton, *and others.* July 1671.

THIS Cause begins fol. 173. and being abated by the Plaintiffs inter marriage since the last Hearing, a Bill of Reviver was brought, and the Cause was reheard by the Lord Keeper, assisted with Justice Wyld and Baron Windham the third of March 1670. And the Case appearing to be as before, it was for the Defendants insisted, that the Contract made by Sir Hugh Middleton, with Mr. Bishop, did not bind, and that he being but Cestui que trust of a Surplus, had no power to sell, for that it was against the very essence of the Trust for him to have a power to dispose; and it would be a vain thing for any Parent to settle his Estate by way of Trust to prevent his Sons imprudent disposition of it, (which Sir William Middleton did here so settle his Estate with a design to keep a hand on his Son,) if notwithstanding his Son might have power to sell it when he pleased.

Cestui que trust of a Surplus hath but a bare possibility, and cannot sell.

The breach of an Agreement is not devisable.

And it was farther insisted on for the Defendant, that if the Agreement with Bishop were binding, yet the Plaintiffs have no Title to have the benefit of that Agreement, for that the breach of an Agreement, as the Case was, was not devisable, and so the Plaintiff had no Title, Things in Action, as this Case is, being not devisable.

Equity consists purely in Action and is only attainable by Process in a Court of Equity.

To which it was answered by the Plaintiffs Councel, That Equity consists purely in Action, and is only to be come by, by the Process of this Court; and cited Cole and Moors Case, 5 Jac. Moors Rep. Wind-

Windham was of Opinion that the benefit of this Agreement is not devisable: For Things that consist in Privity must be carried on in Privity, and Sir Hugh Middleton could not have inforced the Devisee, unless she had pleased to pay the Mony Bishop was to pay, and the remedy ought to be reciprocal

The remedy of an Agreement ought to be reciprocal.

Wyld. Sir Hugh had an Equity to the residue after the Debt and Portions paid, and it was a Crime to sell a thing twice, and the Defendant was particeps Criminis, and so no Decree ought to be for him, but would have Sir Samuel Jones and the other Trustees for Sir William Middleton, in whom three parts of the four were vested in Point of Law, convey fourteen shares to the Lady Cornbury and her Heirs.

The consent of the Heir makes good a void devise.

Lord Keeper agrees with Wyld that the clear Equity and Conscience was with Bishops Title, and that the Defendant Simon Middleton did interlope; but did much doubt upon the Devise. Yet forasmuch as Bishops Heir was a Defendant, and consents to the Devise by Answer, did Decree, that Sir Samuel Jones and the Six Clerks to whom he had conveyed by Order of this Court, should convey by consent of the Heir of Bishop fourteen shares to the Lady Cornbury and her Heirs.

The Lord Keeper upon the Hearing by himself alone in June 1670. being of Opinion to dismiss the Bill, and the Court being now divided in Opinion, the Defendant Simon Middleton petitioned for a Rehearing, and had a Hearing accordingly in July 1671. before the Lord Keeper, Master of the Rolls, Rainsford, Wyld and Windham.

And now upon this Rehearing, it was for the Defendant Simon Middleton insisted, that the Agreement with Bishop did not bind, for the reason supra; and farther, that the Agreement it self was imperfect, because the Mony was to be paid as the Trustees should agree, and they did never agree to it, but Henry Middleton the only acting Trustee did so soon as he heard of it, utterly disagreed to it; and also for that the Agreement with Bishop was not pursued, for the Agreement with Bishop was in June 1657. and by that the Conveyances were to be executed in August next, but those not so much as prepared, nor any thing done in time, and but 250 l. paid, and the Defendant Simon had paid above 15000 l. and had a Conveyance by Deed and Fine of the whole thirty six shares (Bishops Contract being but for fourteen shares executed above

twelve years since) and had been in the possession of the whole thirty six shares ever since; and that the Company of the New River had bought in an other Water-Work, from Sir Edward Ford, which was united to that of the New River, and mixt with it, and could not be distinguished, and that no distinct Account could be taken, and so it was impracticable to decree the performance of the Agreement with Bishop, nor could Sir Hugh have compelled him to perform the same. And if the City which was lately burnt had not been rebuilt, or any other loss had befallen the Water-Work, the said Sir Hugh could never have compelled the Lady Cornbury to pay the Mony; and the Heirs consent tho it may bind himself, shall not put a Bargain upon an other.

Consent binds the Party, but shall not bind an other.

But it was for the Plaintiff insisted, that the Mony Bishop was to pay, was enough to pay all the Debts and Legacies of Sir William Middleton, and thereby all the Trusts precedent to Sir Hugh might have been satisfied, and so Sir Hugh had a clear Title to the Surplus, and he was looked upon as the Owner, and the Contract with Bishop was in pursuance of the Trust, and he might by a Bill have compelled the Trustees to sell: And that the reason why the Agreement was not pursued in time, was because Sir Hugh Middletons occasions drew him to the Bath, and he writ a Letter to have it respited till he came back, which was not till after August. And the Defendant Simon was a wilful Purchaser, with notice of the Agreement, and Sir Hugh would have performed with Bishop, if Sir Hugh had not been perswaded by Simon; and Bishop did endeavour to take up Mony of Sir George Prat for that purpose, and that these doings of Simon were against Conscience, and that in Conscience the first Agreement ought to be performed, and the Court ought to decree with, and not against Conscience.

A Purchaser with notice.

Windham adheres to his first Opinion, (viz.) that the Bill ought to be dismissed, for he was not satisfied that Sir Hugh had any such Interest as he could contract for, nor is it well come to the Lady Cornbury, tho Sir Hugh might by a Bill inforce the Trustees to sell; for what a Man may do himself, is not transferrable in all Cases; and what a Man cannot transfer, he cannot oblige by Articles. If Sir Hugh could not grant, he could not by the Articles bind; his Interest is but a meer possibility contingent; in its creation its so. Sir William hath a power to charge,

What a Man cannot transfer he cannot oblige by Articles.

charge, and doth so by his Will, and Sir Hugh could not dispose in his Fathers life time, and what Sir Hugh should have is uncertain, for the Trustees might sell so much as to perform the precedent Trust. Nor was it intended by Sir William, that Sir Hugh should sell. If Sir Hugh had had the possession with this contingent Interest, it might have gone far; but Sir Hugh had no possession. If Sir Hugh had covenanted the Trustees should convey, Equity ought not to decree him to procure them to convey, but to leave the Covenantee to his Covenant at Law; and by the Agreement the payment of the Mony is intangled, and doth not pursue the Trust; and Mr. Bishop could not inforce his Interest; nor is the Devisee bound to pay the Mony, nor shall she take it up or lay it down as she pleases. Cases that rest in Privity are to be carried on in Privity, and Strangers not to be ingaged in it. The Heir comes in as improper as the Defendant, and that cannot help it.

If *Cestui que trust* covenants that his Trustees shall convey, and he hath no means to force them to make such Conveyance, Equity ought not to decree him to procure them to convey, but to leave the Covenantee to his Covenant.

Cases that consist in Privity, are to be carried on in Privity.

Wyld. This is a Case in Equity and in Conscience, and this Court is to help that side that hath Conscience. The Case is on a Trust, and that proper here, and an Interest in a Trust is in Equity assignable or devisable. And if Land be conveyed for payment of Debts and Legacies, and what remains to be to the Heir, the Heir may dispose, and the Fine to Simon Middleton by Henry doth nothing. For its but the Fine for one Tenant in Common which passeth but his own share. Possibly a Fine and non-claim may bar in Equity, but not here, for a Bill was presently filed. Notice is all in all in the Case; and its against good Conscience for Simon Middleton to enjoy; and the Court must judge with Conscience, and not against Conscience. If this be an Interest its devisable; and its but Circuity of Action to bring the Heir to revive; for if he will not execute the Estate to the Devisee, she must bring a new Bill against him. And concluded, that there ought to be a Decree for the Plaintiffs, but no Action to be but of the 7650l. to be paid by the Defendant, and to convey fourteen shares of the thirty six shares, and the mesne Profits to go against Interest.

A Fine of Tenant in Common passeth but his own Estate.

Circuity of Action.

Rainsford conceived the Plaintiff ought to be relieved, for Sir Hugh had an equitable Interest that might be transferred in Equity, tho it was in its creation contingent; and we are not to take our measure as it stood in the Creation, but as it stood when the Contract was made with Mr. Bishop, and he that may transfer may covenant. That

Interest to be considered as it was at the time of the Contract, and not at the time of its Creation.

his Truſtée ſhall do it. And Simon Middleton injuriouſly comes in with notice, and threatens Sir Hugh into this Contract, and conceived Biſhop might deviſe, and concluded as Wyld did.

The Maſter of the Rolls agreed with Rainsford and Wyld, and looked upon the Agreement with Biſhop to be in purſuance of the Truſt.

The Lord Keeper when he firſt heard this Cauſe, was of Opinion to diſmiſs the Bill; but that was on a miſtake, for he did conceive that all the Truſtees had conveyed to Simon Middleton, whereas it ſeems that Henry Middleton (who was but one of the Truſtees) had conveyed to the ſaid Simon. Its a Cauſe of great conſequence, and the Truſtees were truſted as well for Sir Hugh as the others, and conceived the Plaintiffs ought to be relieved. Biſhop hath the firſt Agreement, and Simon Middleton the ſecond, and Equity ought to decree with the firſt, and the Fine and Conveyance carries no more from Henry than his fourth part, and carries Sir Hughs Equity no farther; and ſo decreed, That out of the three parts remaining, fourteen ſhares of the thirty ſix parts ſhall be conveyed by the ſix Clerks to the Lady Cornbury and her Heirs, and no account of meſne Profits, but thoſe to go againſt Intereſt. And as to Fords Water-Work, if it can be ſevered it cannot be taken into the Decree; but if it cannot, there muſt be an allowance for it, and ſo it was decreed accordingly. And whereas the ſaid thirty ſix parts were charged with a Rent of 500 l. per annum to the Crown in Fee, and 100 l. per annum to Henry Middleton for life, and Sir Hugh in his Agreement with Biſhop, had covenanted to diſcharge the fourteen ſhares he had agreed to ſell Biſhop from thoſe Rents. It was farther decreed, that the Plaintiff ſhould enjoy the fourteen ſhares diſcharged of thoſe Rents, and that the other twenty two ſhares ſhould be ſubject to the Plaintiffs indemnity therein, notwithſtanding it was inſiſted, that Sir Hughs Covenant to diſcharge the fourteen ſhares of thoſe Rents was meerly perſonal, and did not, nor could charge the whole Rents upon the twenty two ſhares.

DE

DE
Term. Sanct. Mich.
Anno Regis 23 Car. II.
IN
CANCELLARIA.

The Lord Keeper.

Washbourn *against* Downes. December 5.

THE Question was, Whether a Recovery by Cestuy que Trust should bar as in a Case of an Estate at Law.

The Court held clearly, that a Fine of a Cestuy que Trust will bar the Estate, but not the Remainder over to another; because a Fine will pass or extinguish all Right or Title which the Cognizors have in the Land. But it was doubted, whether by a Recovery of Cestuy que Trust any thing be barred: For that if Tenant in Tail at Law suffer a Recovery, legal Exceptions may be taken to it; but if a Recovery may be in Equity, all those Exceptions are taken away; and as to the Case of Goodrich and Brown, fol. 49. It was said, that was without a President; and the Plaintiff in that Case doth not relie on his Decree; but the Matter was afterwards compromised. And it was a Question in Bathursts and Emason's Case; and that Case was agreed.

By the Fine of a *Cestuy que Trust* in Tayl, the Entail may be barred.

The Court in the Principal Case took time to advise, and advised the Parties to agree. And in the Debate of this Case, it was said that a Perpetuity is, where if all that have Interest, joyn, and yet cannot barr or pass the Estate. But if by the concurrence of all having the Estate Tail may be barred, it is no Perpetuity.

The definition of a Perpetuity.

Sir

Sir Robert Atkins *againſt* George Mountague.

THere was a Tryal at Barr touching the Title of the Maſter of the Hoſpital of St. Katharines, which the Plaintiff claimed by a Grant from the Queen Conſort that now is; and the Defendant held and enjoyed by two Grants, one from Henerietta Maria, the Quæn Dowager; another from his Majeſty that now is, before his Marriage.

Upon the Evidence divers Points aroſe.

Monaſticon 2d. part 460.

1. The Plaintiffs Title was founded upon the Charter of Quæn Eleanor, Dowager of H. 3. (which ſee in Dugdale) who added to the Endowment of this Hoſpital moſt part of the Poſſeſſions,

Reſervatis nobis & Reginis Angliæ nobis ſuccedentibus plenam poteſtatem providendi Magiſtrum, &c. Volumus etiam, quod omnes Reginæ nobis ſuccedentes Jus Patronatus habeant, &c.

which was confirmed by the ſubſequent Charters of E. 2. and E. 3.

2 *Keb.* 808. *Co. Lit.* 8. *Princes* Caſe.

2. Againſt the Foundation of this Title the Defendants Counſel objected, That a Limitation of the Patronage Reginis ſuccedentibus by Charter is void, for ſuch a deſultory kind of Inheritance cannot be limited but by Act of Parliament, juſt as the Dutchy of Cornwal was by Act of Parliament in 11 E. 3. limited to the Kings eldeſt Son for the time being.

Difference between an Advowſon *in eſſe* and the Patronage of an Hoſpital newly created.

But Hale Chief Juſtice and whole Court reſolved to the contrary; for they took a difference betwæn an Advowſon in Eſſe, and the Patronage of an Hoſpital newly created; for the Land or an Advowſon, 'tis true, no deſultory kind of Inheritance can be limited without Act of Parliament, becauſe then he who had Right could not always know againſt whom to bring his Action: But of the Patronage of an Hoſpital newly founded there can be no precedent Right, and therefore at the very firſt Inſtitution it may be limited as the King pleaſes, like the Caſe of a Rent de novo.

Though the ſeveral Patents were produced on each ſide, wherein the Maſter of the Hoſpital had bæn granted in Reverſion, yet reſolved by Hale, and the whole Court, that all ſuch

such Grants were void: For the Master of that Hospital, when he is seized in Fee in Right of the Hospital, and of an Estate in Fee simple, there can be no Reversion to grant. Therefore this Case is not to be compared to the Grant of an Office in Reversion, but is more like the Case of a Prebendary or a Donative, which cannot be granted in a Reversion.

Master of an Hospital, Prebendary, Donative not grantable in Reversion.

3. Then it was objected by the Plaintiff, that the Defendants Grant from the Quæn Dowager was void, because there was a former Grant which the Quæn Dowager made to one Mr. H. Mountague who was alive at the time of the Grant to the Defendant. The Defendant shewed that the Grant to H. Mountague was void, because it was Habend' post mort' Sir Julius Cæsar, and so a Grant in a Reversion, which was held a clear Answer.

4. It was resolved, That in a Patent which grants the Mastership of an Hospital, the words are not to be so precisely examined as in a Patent of Land or other Office; for in this Case it is sufficient, if there be Words of Nomination only, because the Patentee is not in by the Patent alone, but by the original Constitution upon the Foundation.

Diversity between the Grant of the Mastership of an Hospital and a Patent for Land.

5. It was said by Hale, that though here the Question be touching the Interest of a Quæn Dowager in the Patronage when there is no Quæn Consort, yet it seemed to him that if there be a Quæn Dowager and Quæn Consort both at the time of the voidance of the Hospital, the Quæn Dowager shall present.

6. If the Dowagers Grant be good, when there is a Quæn Consort, it is much more so when there is none; and if there could yet remain a scruple, the Kings Grant and Confirmation clears it; for if there be no Consort nor Dowager doubtless the Kings Presentation is good: And this alone is sufficient to support the Defendants Title.

The Plaintiff replyed, That the Kings Presentation in such Case was good only by way of a provisional supply until a Consort come, and then was to cease.

Which all the Court denyed; for the Master by his Incumbency gains a Fee simple, which cannot be determined by the determination of the Plaintiffs Interest; as in the Case of the Dutchy of Cornwal: If the King let the Land, the Lease is void when the Prince is born. But if he present to an Advowson, the Clerk continues.

Wherefore the Plaintiff seeing the Opinion of the Court against him, became nonsuited.

DE

DE
Term. Sanct. Hill.

Anno Regis 23 & 24 Car. II.
IN
CANCELLARIA.

The Lord Keeper.
Justice Twisden.

Susanna Holford *against* Holford. Febr. 9.

THIS Cause having bèn formerly heard, and the Plaintiff claiming under Articles of Marriage, betwèn her Father and Mother, whereby in consideration of a great Portion, her Father did agrèe to settle the Lands in question on himself and his Wife and their Issue (whose Issue the Plaintiff is) but tho' he lived some years after, did not execute any Conveyance. And the Defendant being the Plaintiffs Fathers Brother, claimed by a Dèed of Intail made by the Plaintiffs Father ten years before the Articles (whereby for failer of Issue Male on his own Body the Lands were limited to the Defendant) It was directed to a Tryal on this Issue, Whether the Dèed by which the Defendant claimed, was fraudulent or not, and the Defendant to admit the Plaintiff a Purchaser, that the Fraud might come in Issue. A Tryal was had, and it was found against the Plaintiff.

Trial of a Deed, whether fraudulent.

And

And now for the Plaintiff it was prayed there might be a new Tryal, and that the Defendant might at such Tryal admit the Plaintiff had a Conveyance: For as it stood upon Articles the Defendants Conveyance could not be taken to be fraudulent against the Articles, nothing passing in Law thereby, and yet it would be fraudulent against a Conveyance.

A Conveyance cannot be fraudulent against Articles without another Conveyance be executed in a legal Course.

And therefore it was insisted, the Defendant ought to admit the Plaintiff had a Conveyance, though not such a one as to bar the Estate Tail, yet a Conveyance by way of Lease and Release; as if the Plaintiffs Father was seized in Fee, and then the matter of the Fraud would properly come in Issue, which the Court denyed, and so dismissed the Bill. And in the arguing of this Cause it was admitted, that every voluntary Conveyance is prima facie fraudulent against a Conveyance for Consideration.

Tryal of fraudulent Conveyance.

The Lord Keeper.
Chief Justice Hales.
Justice Wyld
Justice Windham.

Chaumond Roscarrick *Esquire against* Barton.
February 21.

MAY 12. 10 Jacobi, Charles Roscarrick on his Marriage with Dorothy his Wife, settles the Lands in Question (inter alia) on himself for Life, Remainder to Dorothy for Life, Remainder to the Heirs Males of his own Body; he hath Issue Charles his first, and the Plaintiff his second Son, and dies; Dorothy marries with one Greenvil, and they enter on the Lands in Question as the Joynture of Dorothy.

Charles, the Son, 15 Novemb. 13 Car. 1. by Deed, Fine and Recovery for 800 l. conveys the Lands in Question to Greenvil and his Wife, to the use of Dorothy for Life, Remainder to the use of Charles and his Heirs, till he fail to pay several Sums at several days, amounting to 800 l. and after default of payment of any Sum to Greenvil and his Heirs.

Afterwards 14 Car. 1. Charles on his own Marriage ſetles the Lands in Queſtion, inter alia, to himſelf for Life, Remainder to Margaret his Wife for Life, Remainder to his firſt and other Sons in Tail, Remainder to the Plaintiff in Tail. In 1650 Greenvil aſſigns his Eſtate which was for the Security of the 800 l. and was forfeited to the Defendant by the conſent of Charles. In 1656 upon a Bill exhibited by the Defendant in Chancery againſt Charles, It's decréd Charles ſhall pay the Defendant what's due to him (viz.) 1250 l. or the now Defendant, Plaintiff in that Cauſe, to hold againſt Charles and all claiming under him. Charles dies without Iſſue Male, Dorothy lives till 1668. then the now Plaintiff exhibits his Bill to redéem, and alledges that the Decrée againſt Charles was by conſent, and that it was agréd betwæn Charles and the Defendant, that notwithſtanding the Decrée, it ſhould be ſtill a Mortgage in the Defendants hands and be redæmable upon payment of Principal and Intereſt, and however that the Plaintiff being no party to that Decrée, and Charles but Tenant for Life, that Decrée could not bind the Plaintiff. And as to the pretence of an Agréement betwæn Charles and the Defendant, that notwithſtanding the Decrée the Eſtate ſhould remain ſtill a Mortgage in the Defendants hands, there was no proof of any ſuch Agréement or Conſent, but only told Charles he would come to an account; but there being Dealings and Accounts betwæn the Defendant and Charles, it was declared by the Lord Keeper (who firſt heard this Cauſe in July 1671.) that general words not particularly applyed ought not to ſhake a Decrée; for if they did, there would be no end of Suits.

General Words cannot be applied to particulars.

But then it was inſiſted for the Plaintiff, that he being no party to the Decrée was not bound thereby, and that he had an Equity to redæm, and that the Mortgage was not to be taken to be more ancient than from the time of the Aſſignment to the Defendant, for that an Account being then ſtated with Greenvil, and he paid off, there was no Account to be precedent to that, and ſo could not be taken to be elder than 1650, and that ſo the Plaintiff ought to be admitted to redæm, and the rather, for that the Defendant had notice (which was admitted) of the Déed 14 Car. 1. by which the Plaintiff claims before he took the Conveyance from Greenvil; and whether the Plaintiff ſhould redæm the Lord Keeper doubted, but took time to conſider.

An old Mortgage aſſigned to another, ought to be taken as a new Mortgage from the time of the Aſſignment.

And

And now 21 Feb. 1671. this Cause was finally heard before the Lord Keeper, assisted with Chief Justice Hale, Mr. Justice Wild and Baron Wyndham.

It was insisted for the Defendant, the Plaintiff was no Party to the Deed of the Mortgage, and that the Deed of 14 Car. 1. by which the Plaintiff Chaumond claimed, howbeit it was made in consideration of Charles his Marriage, was to Chaumond the Plaintiff purely voluntary. And that albeit a voluntary Conveyance would pass an Equity of Redemption, yet in this Case where the Plaintiff claims an Equity by way of Intail, it ought not to be countenanced in Equity; For that the consequence of it would be to make an Equity of Redemption perpetual. If a Mortgagor after a Mortgage made may make himself Tenant for Life of that Equity, with Remainder in Tail, as here, Remainder for Life, &c. which being but a Right of Action, a Right to a Bill in Equity ought not to be so intailed, and that this was not such an Inheritance as was intailed by the Statute de donis, &c. but being a Right of Action vested in the Father, with Remainder to his first and other Sons before Chaumond, there was no need to have made Chaumond Defendant to the said Decree: And Dorothy who was the Tenant for Life lived till 1668. so that the Mortgage was all that time but of a dry Reversion, and Margaret the Wife of Charles, who lived until very lately, and who had a Title of Redemption precedent to the Plaintiff, did not seek to redeem.

A voluntary disposition of an Equity of Redemption is not to be favoured.

An Equity of Redemption intailed tends to make it perpetual.

An Equity of Redemption not intaiable within the Statute.

Wyndham was of Opinion as this Case was, that the Plaintiff ought not to be admitted to redeem.

Judge Wyld. There is no Fraud in the Settlement 14 Car. 1. and a Decree against Tenant for Life will not bind in the Remainder in the Case of an Estate at Law; and he did not see why it should bind in Equity, and so he conceived the Plaintiff was relievable.

Chief Justice Hale. By the Growth of Equity on Equity, the Heart of the Common Law is eaten out, and legal Settlements are destroyed; and was of Opinion, there is no colour for a Decree. In 14 R. 2. the Parliament would not admit of Redemption; but now there is another setled course; as far as the Line is given, Man will go; and if an hundred years are given Man will go so far, and we know not whether we shall go. An Equity of Redemption is transferrable from one to another now, and yet at Common Law if he that had the Equity made a Feoffment, or le-

Equity on an Equity.

Equity of Redemption carried too far.

vied a Fine, he had extinguished his Equity at Law; and it hath gone far enough already, and we will go no further than Presidents in the matter of Equity of Redemption, which hath too much favour already; and concluded there should be no Decree for the Plaintiff in respect of the Antiquity, and if he will redeem, he must come in time. It is but just to foreclose for not coming in time: It's just to deny Redemption, if he come not in time. And a Decree to foreclose a Tenant in Tail shall bind his Issue in an Equity of Redemption, because that is a Right set up only in a Court of Equity; and so may be here extinguished; and the Estate moved from Charles to the Mortgagee, and not from the Plaintiff; and Charles was the visible Possessor and Owner. And its a great sore, that Mortgagees are but Bayliffs; and the Limitation to Chaumond was but voluntary, and so the Plaintiffs pretence is not to be supported against a Purchaser, for so a Mortgagee is; and here its made absolute by the Decree; and if there be divers Remainders of the Equity, there is no reason to make them all Parties.

Antiquity a Cause to deny Redemption.

A Decree to foreclose Tenant in Tail from redeeming, concludes his Issue and the Remainders.

The Lord Keeper concurred with him, and said he, it goes current, that if a Mortgage be twenty years old, the Mortgagee shall have no Interest on Interest: But herein he is not satisfied, especially in this Case, where the Defendant could not get into possession by reason of the Estate for Life to Dorothy, who lived till 1668. and was clear of Opinion that the Plaintiff ought not to be admitted to redeem. And made great difference betwen Parties that come to redeem, who are no Parties to the Mortgage, and those that are Parties to the Mortgage. And so the Bill was dismist.

A difference between parties to the Mortgage coming to redeem and Strangers.

The Earl of Athol *in* Scotland *against the Earl of* Derby, *and the Administrator of the Countess of* Derby.

James Earl of Derby Tenant for Life makes a Lease for one and twenty years to his Wife of the Isle of Man, for Provision for younger Children, and dies; she agrees with the Earl of Athol on the Marriage of her younger Daughter the Lady Emilia, to give him 5000 l. Portion, and that he shall have the Isle of Man valued at 1000 l. per annum for five years to pay it. Charles Earl of

of Derby his Son, the Defendant, oppoſed this Leaſe, being made by Tenant for Life, and betwæn Baron and Feme, but by the Mediation of certain Lords in Parliament, Earl Charles and his Mother came to a new Agrément in the year 1660. That ſhe ſhall have the one Moiety of the Profits of the Iſle, and he the other. In 1661. They came to a new Agreement, that he ſhould in lieu of the Agreement pay his Mother 5000 l. per annum, and in the cloſe of the Deed appoints his Receiver for the Iſle of Man to pay it. All theſe Agreements were made by the Countels on behalf of the Earl of Athol, to enable him to receive the 5000 l. and then the Countels dyes.

It was decréd by the Maſter of the Rolls, That the Earl of Athol ſhall have his 500 l. againſt the Earl of Derby, and his perſon to be charged, and the Earl of Athol ſhall not be forced to the Iſle of Man, which is the place originally charged; for by the laſt Agrément he is to pay 500 l per annum abſolutely, and in lieu of the Profits let the Earl of Derby make what he will of them; and the appointment of the Receiver to pay it is but directory, and if the Receiver do not pay it, the Earl muſt.

Maynard and others of the Plaintiffs Counſel held that the Court could not by any Decrée bind the Iſle of Man; nor if they ſhould decrée it, could they execute the Decrée there, it being out of the power of any Sheriff. They alſo held that the Letter of Attorny being determined by the Counteſſes death, that the Court would not have made a Decréé for the Earl, though her Adminiſtrator is Defendant, unleſs in the Caſe of a Marriage Agrément, and that it was proved thoſe Agreements were made on his behalf. Afterwards Sequeſtration was awarded againſt the Earl of Derby.

The Iſle of *Man* out of the power of the Court.

Whereupon a Queſtion aroſe, What time of Priviledge a Péer hath (viz.) whether twenty or ten days before and after Seſſion of Parliament?

The Lord Keeper ſent to the Lord Hollis and others to adviſe in it, and they produced two Orders in the Houſe of Lords, whereby it appeared they declared their Priviledge to commence from the Teſte to the Writ of Summons for their firſt coming to Parliament. And that upon every Seſſion and Prorogation their Priviledge is for twenty days after ſuch Seſſion. And it is ſaid in the Orders, that it is a ſufficient time for them to come from all

Priviledge of Peers in Parliament when it commences and when it ends.

all parts of the Kingdom, and to return, and are in those Orders desired to take notice of it and of the reason of it.

These Orders are, the one of the 24th of May 1624. the other of the 27th of January 1628. entred into the Journal of the Book of the Lords House.

But it is said, the Commons never agreed hereto and therefore think themselves not bound by it.

Note, This Sequestration was executed accordingly; but the Earl of Derby soon after dying, and the Estate being intailed, the Earl of Athol lost the rest of his Wifes Portion.

DE
Term. Sanct. Hill.
Anno Regis 25 Car. II.
IN
CANCELLARIA.

The Lord Keeper Finch.

Hayes *againſt* Hayes.

A. Seiſed in Fæ, deviſeth to his Heir, on Condition that he pay to the Daughter of A. 500 l. at her Age of ſixteen years, and on default, that he ſhould enter and raiſe it; the Heir deviſeth to his Mother for Life, and afterwards to his Brother in Fæ, and dies; the Mother enters, the Daughter is under Age, and the Brother having the Reverſion and Inheritance, exhibits his Bill to have the Mother pay a part of the 500 l. ſhe having part of the Eſtate as Security for Life.

It was objected, that the Daughter is not of Age, and ſo this Bill is quia timet only; and it may be that the Mother may live till the Daughter is of ſixteen, and then the Daughter may enter and raiſe, and ſo the Brother, who is the Reverſioner, ſhould not be grieved; and the Court would be vexed with vain Suits if any one might be admitted to ſue only quia timet, to prevent a remote Poſſibility.

Tenant for Life ſhall contribute with the Reverſioner toward the Arrears of a Charge or Mortgage.

But the Court anſwered, that Suits quia timet only were proper in Law and Equity: Its Law of a Warrantia Chartæ in Equity, as where A. grants a Charge of 100 l. per annum in Fæ, and deviſeth to B. for Life, Remainder to C. in Fæ, and dyes, C. exhibits his Bill to compel the Tenant for Life to pay the Arrears, elſe all will fall on the Reverſioner; and this hath bèn decreed; and the

Suits *quia timet* in Law and Equity.

the first Cause about Contribution was between ..... and ..... where A. had mortgaged the Manor of Guilford for 2500 l. and then deviseth to B. for Life, the Remainder to C. in Fee, C. preferred his Bill to force B. to pay his Share of the Mortgage Mony, and it was decreed that he should: And there have been twenty Cases since of the like nature. So in the principal Case there being a Demurrer to this Bill for the Causes aforesaid, the Defendant was ordered to answer; and then Sir John Churchil moved, and said for the Defendant, that she should prove that it was the intention of the Devisor here that she should pay nothing, which was not answered, but was admitted to be material.

The Lord Keeper Finch.

Butler *against* Bernard. February 24.

A Term aliened by an Administrator shall go to his Executor and not to the Administrator *de bonis non.*

AN Administrator makes a Mortgage of the Intestates Term, and make A. his Executor, and dies; B. takes out Letters of Administration de bonis non to the first Intestate, and claims the Residuary Interest and Trust of the Term, and prays that he may have the benefit of Redemption. But the Court decreed the benefit of Redemption to A. the Executor of the first Administrator, who had aliened the whole Estate in Law of the Term, and was not possessed in auter droit, nor of any part of the Interest thereof, but in his own Right; and so it shall go to his Executor, and not to B. the Administrator de bonis non.

DE
Term. Sanct. Mich.
Anno Regis 25 Car. II.
IN
CANCELLARIA.

The Lord Keeper Finch.

Colonel Doyly *againſt* Perfull. October 25.

THE Wife having aſſigned her Term in Truſt for her ſelf before Marriage, and then the Husband without joyning with the Truſtées does mortgage the Truſt, and the Husband being dead, the Mortgagee being Plaintiff, exhibits his Bill to have the Lands conveyed to him, or that they ſhould redeem; and the Court diſmiſt the Plaintiffs Bill; for ſince Queen Elizabeths time it hath been the conſtant courſe of this Court to ſet aſide and fruſtrate all Incumbrances and Acts of the Husband upon the Truſt in the Wifes Term, and that he ſhall neither charge or grant it away: And tis the common way of Proceeding for the Joyntures of Women, to convey a Term in Truſt for them upon Marriage, that it may be out of the power and reach of the Husband; neither ſhall he forfeit it by Outlawry or Felony, if for Joynture or in purſuance of Articles of Marriage; or being the Wifes Term it is aſſigned before in Truſt, as here, or if on other good conſideration it be aſſigned. But if it be an Aſſignment after Marriage by the Husband in Truſt for the Wife, this is voluntary and fraudulent againſt Purchaſers, and this was the great Exchequer Chamber Caſe.

The Husband cannot grant or charge the Term of the Wife in Truſt.

Nor forfeit it for Outlawry or Felony.

Aliter of Aſſignment after Marriage by the Husband.

DE
Termino Paſchæ
Anno Regis 26 Car. II.
IN
CANCELLARIA.

Davis *againſt* Curtis.

Nota, The Bond determined the parol Agreement.

DAvis Executor of C. imployed as a Maſter of a Ship by the East-India Company, covenants with them that he ſhould pay a certain Mulct for every Cloath carried, &c. in the Ship, and took the Defendant to be his Mate, who made an Agreement mutatis mutandis, with Davis, and gave a Bond of 50 l. for due performance on his part; but he without Davies his knowledge carried ſo many Cloaths as the Mulct came to 70 l. which the Company deducted out of the Maſters Wages, and the 50 l. Bond would not ſatisfie, and therefore prayed relief and diſcovery of the Teſtators Eſtate.

No relief above penalty in Equity.

Bill to diſcover Aſſets, and does not charge that any Goods came to his Hands, ill.

The Defendant demurred. 1ſt. The relief of more than ſecurity by Bond, not proper in Equity. 2d. That part of the Bill which ſtands for diſcovery of Aſſets was ill, becauſe the Charge in the Bill was not poſitive, that Aſſets, or that any Goods came to the Defendants Hands; and ruled in both Points accordingly.

Cook

Cook *against* Bampfield. May 19.

William Pierce Prebend of Rutland-Denham leased the Rectory of R. to Thomas Bampfield, George and Edward Bampfield, in Trust for Thomas, who conveyed his Interest to Sir R. P. but G. B. was no Party, but beyond Sea. The Prebend Lessor dyeth, Tisdel his Successor (on a Surrender to him of the former Lease produced to him, but G. B. sealed it not, so that in Law it was void against G. B.) makes another Lease to Sir R. P. for three Lives, which Lease was for divers years enjoyed till all those three Lives dyed. Tisdel being dead, Cook takes a Lease of Duncomb, who succeeded Tisdel, for 400 l. Fine. George Bampfield comes from beyond Sea, and sets on foot his Title for a third part. The Matter was by Reference put to Arbitration (the point of Trust or no Trust being before by direction tryed by a Verdict for Cook, that G. B. his Name was used in Trust for Tho.) and G. B. having by Tryal at Law recovered one third part of the Premisses, the Arbitrators awarded, that G. B. should permit Cook to enjoy the said third part, paying 16 l. yearly to G. B. during his Life. G. B. dyed; the Plaintiff exhibits a new Bill against Edward B. reciting the former, and prays Relief.

Duncomb dyed, Aston succeeds in the Prebendary; and before the last Bill Aston for 120 l. makes a new Lease to Edward B. for three Lives, yet in being. Edward B. was bound to Cook that G.B. should perform, which in all George his time was on all sides executed. Aston received the Rents of Cook after Duncombs death: 27 Novemb. 23 Car. 2. It was decreed that Edward and George B. should pay to Cook all the Profits received, deducting the 16 l. per annum, and that Edward B. should assign his Lease to Cook for three such Lives as he should name: And on a Bill of Review this Decree was confirmed by the Lord Keeper Finch 10th of May instant, Ellis and Littleton concurring.

The Objections against the Decree were, First, That the Lease of Duncomb was not good in Law, being of the whole in Possession and Reversion, when at the making thereof George B. was Tenant for Life for one third part; which was not much denied, and being avoided by Act of Parliament this Court might not supply it; and Aston

Leſſee of a Prebend mortgageth his Leaſe and after the day pays the Mony, and then ſurrenders, and takes a Leaſe from the Prebend, he hath good Equity againſt the Mortgagee.

If the Prebend dye, Equity ſhall not make the ſecond Leaſe good againſt the Succeſſor.

Chancery cannot help in Equity againſt an Act of Parliament.

the Succeſſor is not bound by any Tranſaction of the Account made in the time of his Predeceſſor againſt an Act of Parliament. And it was as free for Edward B. to deal for an Eſtate with Aſton the Prebend as for any other Man, and that if there was any Equity to ſupport the Leaſe againſt the Leſſee or his Aſſigns, or againſt Duncomb Predeceſſor to Aſton, that Equity ſhould not bind Aſton. Put Caſe the Leſſee of a Prebend or Biſhop ſhould mortgage his Leaſe or part of it, and after the day pay the Mony, and then ſurrender and take a Leaſe from the Prebend; he hath good Equity againſt the Mortgagee; but if the Prebend dye, this Equity ſhall not make the ſecond Leaſe good againſt the Succeſſor againſt the Statute which binds all Men and hath no ſaving of ſuch Rights of Equity; and the Chancellor may not add to a Statute to make a Saving which the Statute hath not made. An Infant bound by Statute of Fines ſhould not have been helpt in Equity.

But notwithſtanding the Decree was confirmed; for by the Surrender of Tho. who was Ceſtuy que Truſt, the Leaſe in Equity was avoided as to the then Prebend, and therefore ſhall never be ſet on foot againſt a Succeſſor. Duncomb takes 400 l. Fine and reſigns when there can no more Fine be made, and Aſton would now ſet on foot the Statute and a new Fine, which appears againſt the Practice.

The 2d Objection. The Purchaſer from T.B. viz. R.P. took a new Leaſe for three Lives, whereby the Purchaſer had the full benefit of his Purchaſe, and thoſe new Lives being now all dead, it is no reaſon that Cook ſhould ſet on foot the Intereſt of the old Leaſe again.

The Lord Keeper. Nor ſhall Aſton, nor Edward B.

The Decree was confirmed.

The Mayor and Aldermen of London *againſt the Earl of* Dorſet. May 30.

Examination after Publication and after Hearing.

UPON a Commiſſion of Charitable Uſes, The Queſtion on Appeal was, Whether certain Houſes were part of Bridwel belonging to the City for Relief of the Poor, or a part of Dorſet-Houſe; which Point was referred to Law to be tryed, and then to report.

A. B.

A. B. moved for a Commiſſion to examine an old Witneſs 80 years old, who was not diſcovered till now, and unable to travel. If ſhe was able to travel ſhe would be examined at the Tryal; and tho Publication on Hearing was paſt, yet the Queſtion being of Free-hold, and not properly tryable at Law, it was reaſon that the Teſtimony ſhould not be loſt, and poſſibly the Land thereby. The Motion was oppoſed, becauſe of Publication.

The Lord Keeper. The Rule of Non-examining after Publication hath bin ſtrict in this Point; but the Court is the Judge, and the Examiners, here or by Commiſſion, are miniſterial to the Court; ſo he ordered a Commiſſion and Examination.

Burges *againſt* Burges.

THomas Burges after his intermarriage with Elizabeth Hughs his firſt Wife, by Leaſe and Releaſe dated 24 July 1669. in conſideration of his Wifes ſetling her Lands upon him and his Heirs (which was done by Fine) conveys divers Freehold Lands to the uſe of himſelf for life, and after his deceaſe to the uſe of his Wife Elizabeth for her life, and after the determination of the ſaid Eſtates, then to the uſe of the firſt Son of the ſaid Thomas on the Body of the ſaid Elizabeth, to be begotten, and the Heirs of the Body of ſuch firſt Son; and for default of ſuch Iſſue, to the uſe of the 2d, 3d, 4th, 5th, 6th, 7th, and every other Son and Sons of the Body of the ſaid Thomas, on the Body of the ſaid Elizabeth, to be begotten, ſucceſſively, and the Heirs of the Body of ſuch Son or Sons; and for default of ſuch Iſſue, then if at the death of the ſaid Thomas the ſaid Elizabeth ſhall be enſeint with Child, then to the uſe of Skinner and Clark, Truſtees, and their Heirs, until the Birth of ſuch after-born Child or Children; and if it be a Son or Sons, then to the uſe of ſuch Son and Sons, and the Heirs of the Body of ſuch Son and Sons; and for default of ſuch Iſſue, to the uſe and behoof of all and every the Daughter and Daughters of the ſaid Thomas Burges, on the Body of the ſaid Elizabeth, begotten or to be begotten, as well which ſhall be born, as which ſhe the ſaid Elizabeth ſhall be enſeint with at the time of the death of the ſaid Thomas, and the Heirs of the Body of ſuch Daughter

Daughter and Daughters, and for want of ſuch Iſſue, to the uſe of the right Heirs of Thomas and Elizabeth for ever.

Limitation of a Term being a remote Truſt, and tending to a perpetuity, void.

Thomas Burges being likewiſe poſſeſſed of other Lands by two Leaſes for ninety nine years, determinable upon three lives, by an other Deed bearing date with the fore-mentioned Deed of Settlement, for the conſideration therein mentioned did aſſign the ſaid Leaſehold Lands to Skinner and Clark, two of the Defendants, in Truſt to the ſeveral intents and purpoſes, and for the uſes which are limited and declared of and concerning the ſaid Lands of Inheritance of the ſaid Thomas Burges in and by the ſaid Indenture bearing even date with the ſaid Deed and Aſſignment.

Thomas Burges had no Son by the ſaid Elizabeth, but had one Daughter, which is now the Defendant Elizabeth, who was alive at the time of the making of the ſaid Indenture, being 21 Dec. 1668. Thomas Burges ſurvived, and after married Urſula a ſecond Wife, by whom he had Iſſue two Sons and one Daughter, and died Inteſtate, and Urſula his Wife is Adminiſtratrix.

Qu. Whether the Truſt of the ſaid Leaſes doth belong to Elizabeth the Daughter, or the Adminiſtratrix?

After this Cauſe was ſtated, and the Lord Keeper Finch had took time to conſider it, he declared that the Limitation (becauſe it was a remote Truſt, and tended to a perpetuity) to the Defendant Elizabeth, as Daughter of Thomas Burges, was a void Limitation, and on that reaſon decreed the two Leaſes to the Plaintiff as Adminiſtratrix to Thomas Burges.

DE
Term. Sanct. Trin.
Anno Regis 26 Car. II.
IN
CANCELLARIA.

Anonymus. July 2.

IF the Bill exhibited be grounded on the loſs of a Bond, Doth muſt be made of ſuch loſs, becauſe that ſuch loſs is that which intitles the Court to juriſdiction of the Cauſe, elſe the Party hath his remedy at Law. No Oath is required of loſs of them, but only ut ſupra, where the Oath doth intitle the Court to Juriſdiction. By the Lord Keeper.

Where Oath muſt be made of the want of a Deed, Bond, &c.

Organ *againſt* Gardiner. July 2.

AN Original Bill to execute a Decree of Lands againſt a Purchaſer, who claimed under Parties bound by that Decree, was allowed good on Demurrer thereto, by the Lord Keeper.

An Original Bill to execute a Decree againſt a Purchaſer, claiming under parties bound thereby.

Aſh.

Aſhcombs *Caſe*. July 15.

THE Bill was exhibited by the Plaintiff, a Feme Covert and her Friends, againſt her Husband and two others, Maſcal and S. The Caſe was, That the Plaintiff being a Dutch Woman brought 4000 l. Portion to her Husband, who agreed with her before Marriage to leave a compleat Maintenance for her Self and her Children, not expreſſing what; The Marriage took effect, but he declining in Eſtate, her Friends called on him; and he thereupon aſſigned certain Bonds, wherein M. was bound to him; and a Letter of Attorny was made after to S. to receive the Mony upon the Bonds, who received the Mony of him. The Bill was to have the Mony from M. and S.

Plea, Notice.

Maſcal by Plea ſets forth the payment to S. and that he had no notice of the aſſignment of the Bonds. And this was allowed a good Plea for Maſcal. But S. pleaded a Letter of Attorny, and payment to him on good Conſideration, but did not deny notice; and therefore his Plea diſallowed, and the Agreement and Aſſignment of the Debt in Holland where ſuch Agreement between Husband and Wife, and ſuch Aſſignment of Bonds are good, and they are to be allowed here by the Lord Keeper.

Aſſignment of Bond in *Holland* according to their Cuſtom allowed here.

Anonymus. July 15.

A Bill exhibited to have an Account here of Mony collected by Authority of Commiſſioners of Sewers diſmiſt by the Lord Keeper; for the Commiſſioners are to take the Account, and not the Chancery. Otherwiſe in caſe of Receivers by Authority in caſe of Commiſſioners of Bankrupt; for there it is concerning private Perſons, but this of the Publick, and it was in vain to take Accounts in that Caſe in queſtion, which the Court cannot determine. And altho objected, that a diſcovery is proper here, yet the Bill was diſmiſt on Demurrer.

Sewers Accounts. Chancery will not intermeddle with.

Difference between Commiſſioners of Sewers and Commiſſioners of Bankrupt.

King

King *againſt* Brownlow. July 21.

A Bill was exhibited in Chancery concerning Tithes and Bounds of a Parish, which proceeded to Answer and Replication. Then he exhibited another Bill in the Exchequer, and there Witnesses were examined, and now proceeds again in Chancery, and replies. The Defendant pleaded the Proceedings and Examination in the Exchequer, and ruled good as to examination of the same Matters, which being examined to there, were not to be examined in Chancery.

Witnesses formerly examined in another Court, not to be examined here. Suit for Tithes.

DE
Term. Sanct. Mich.
Anno Regis 26 Car. II.
IN
CANCELLARIA.

Norcliff *and his Wife againſt* Worſley.

An Intail in Equity (not in Law) whether the Iſſue ſhall be bound by the Agreement of his Father without Fine.

THERE was Thomas Worſly, Beſail, Thomas le Ayle, Thomas le Pere and Thomas le Fitz. Thomas Great-Grandfather in conſideration of 800 l. and Marriage of the Grandfather with Wood, covenants to make a Settlement of the Manor of, &c. to Thomas le Ayle and Wood, whom he was to marry, for Joynture for the Wife and the Heirs Males of Thomas by his ſaid Wife. Thomas, the Grandfather, within one year dyed, Thomas, the Father, then in ventre ſa mere.

5 Car. 1. Elizabeth, the Wife of Thomas deceaſed, obtains a Decree againſt the Beſail for the Lands, for performance of the Articles both for her ſelf and Son, Father of the now Defendant. Thomas, the Father, 1652. obtains a Decree to the effect of the former: It ſet out, that Thomas Beſail after the Articles, and firſt Bill and ſecond Bill, made voluntary Conveyances of the Lands, whereby he had ſetled them ſo as the Eſtate in Law was now in Elizabeth and the Son of John his ſecond Son, under power of Revocation by Deed, and dyed after. Thomas, the Father, on Marriage with Penelope his ſecond Wife (he then

then having Iſſue the Defendant Thomas by his firſt Wife, and inheritable to the ſpecial Intail,) agreed (as tis alledged) to ſettle the Land on his ſecond Wife and their Heirs by her; and pending the Suit Elizabeth conveyed away the Lands to Thomas the Defendant. Thomas the Father being dead, Penelope his Widow and her ſecond Husband exhibits a Bill to have the Lands ſetled on her for her Life, viz. 300 l per annum part thereof, and to have other part thereof lyable to Debts; for Thomas, the Father of the Defendant, had ſo ordained by his Will in Writing. After Publication in this Cauſe, Thomas, the Son exhibits his Bill againſt Norcliff and his Wife, grounded on an Agreement by Penelope with Thomas to accept of certain Lands, part of the Lands in Queſtion of 100 l. per annum, in lieu of Joynture, Dower, and all Demands, which was executed ſeven years by enjoyment by Penelope.

Two Queſtions aroſe. 1. Whether the Agreement of Thomas, the Father, to ſettle the Lands, &c. on his ſecond Wife, did bind Thomas, the Son, by reaſon that he was entituled in Equity to an Eſtate Tail in the Land, and therefore ſhould not be bound by his Fathers Agreement? For if the Land had been ſetled in Tail, it could not bind the Iſſue, and the Right of an Eſtate Tayl is deſcended on him; And the Plaintiff ſued for her Joynture raiſed on Equity, but it is a puny Equity to Thomas the Grandchild. The Conſiderations are on both ſides the ſame, viz. Marriage Agreement and Portion; only the Defendant Thomas inſiſted, that his Agreement by which he claims was in general Terms for Lands of 300 l. per annum, and not for Lands in Queſtion particularly. And alſo if it were for ſome of the Lands by particular Names with Covenant that thoſe particulars were 300 l. per annum, if ſuch Agreement did bind as to the particulars, yet the Covenant for the value, nor the Will did not bind the other Lands ſo as to have the value ſupplyed out of the other Lands agreed to be entailed. And though if the Lands had been entailed, though the Father might have cut off the Intail by Fine and Recovery, yet without Fine or Recovery they could not; And there is no Fine, &c. nor any Attempt or Proceedings towards levying a Fine or Recovery.

As to this Point the Lord Kæper Finch gave no reſolution; but ſaid, he conceived a difference in the Caſe, viz. Whether Penelope's Agreement was in general for Lands of 300 l. per annum, or particular; and if particularly relating to the Lands in Queſtion; Whether ſo much was mentioned as amounted to 300 l. per annum, or, which in effect is the ſame? Whether it were not for 300 l. per annum Lands, part of the Lands formerly agreed by the Great Grandfather to be intailed, or in general for 300 l. per annum Lands, without relation to the Lands ut ſupra, by the Great Grandfather to be entailed. And therefore there was much diſpute as to the Fact in that Point.

But the Lord Keeper though he was not poſitive in the main Point, yet ſaid that as to the Agreement by the Father, whether to be avoided by the Son, now Defendant, that in caſe the Lands had been intailed de facto; and agreed, no Agreement could bind the Iſſue without Fine or Recovery or other legal Barr; yet he ſaid the Agreement to entail was not an Intail; and though it raiſed an Equity againſt him that made it, yet that Equity is a Creature of this Court to be governed as Conſcience directs by this Court: And ſaid the Statute de donis was an ambitious Act in favour of the Lords againſt the King; and for that vouched the Lord Elſmere. But before he had ſaid this there were ſome Propoſals of Agreement: And at length the Caſe was compoſed.

Where Equity creates the Eſtate it ſhall be guided by Conſcience.

There was a ſecond Point which was fully proved, that muſt have ended the Cauſe (viz.) the Agreement by Penelope, ut ſupra. But a Diſpute aroſe about the Proof, Whether the Witneſs that proved the Agreement could be read? For the Agreement was not ſet forth in the Anſwer to Penelope's Bill, but was proved in that Cauſe; and it was ſet forth in the Bill againſt Penelope and her Husband, but no Proof thereof in that Cauſe; ſo it was proved in one, and ſet forth in another Cauſe. To ſalve which defect, the Defendant Thomas moved, and had an Order, that the Depoſitions in either Cauſe might be uſed in both, which Order was after Publication in the firſt Cauſe, wherein the Proof was made; but before Publication in the ſecond Cauſe; ſo as the Defendant in that Cauſe had the advantage, having the Liberty to ſee what was produced againſt them, and had liberty to examine.

Depoſitions read in both Cauſes.

Sir

Sir John Churchil who was of Councel for the Defendant Thomas, yielded that they could not be read by his Client. But for my part I know no prejudice to the Defendant, being warned by the Order, and might examine in the second Cause. But the Proposals of compounding the Cause took off all Debates.

Nota, The Defendant Norcliff had a subsequent Order, saving all Exceptions. &c.

Prat *against* Taylor.

THE Bill was to have an account of several Sums of Mony, which the Defendant a Fellow of Exeter-Colledge in Oxford, Tutor to the Plaintiffs Son, received towards the necessary Occasions of her Son.

The Chancellor of Oxford by Instrument in Writing set forth the Priviledge of the University Charters, and Confirmation, &c. by Act of Parliament: And the Defendant was a Scholar, and Resident, and that they had a Court of Equity, and prayed that Taylor might be dismist.

The Lord Keeper did not allow the Claim, and said, that Cognizance of Pleas in Equity could not be granted, though Presidents were shewn of the same Claim allowed in time of Queen Elizabeth. He asked if any could be shewn in the Lord Elsmere or Coventries time; but none could be shewn. And thereupon disallowed the Claim, saying it must be put in by way of Plea. But withal declared it should not be on Oath, but it should be sufficient to aver the Defendant a Scholar, Resident, &c. without Oath; and so he said it should be in case of Outlawry pleaded, the Defendant should not be put to aver the Plea on Oath, but without Oath.

A Scholar of the University sued, the Chancellor puts in his claim of Priviledge by Writing, disallowed.

Bluet *a Dane against* Bampfield *and others, Merchants of* Denmark.

TO be relieved against Actions of Trespass, for seising their Goods in the Island of, &c. on the pretence of breaking an Inhibition of the King of Denmark, whereas by Articles of Alliance, between the Crown of England and

Bill dismist by Sentence given against the Plaintiff in the Court at *Denmark*.

and Denmark, free Trade was allowed to all English in all Ports of the Kingdom of Denmark, whereof the Island was a Port. But in regard Sentence was given in the Court there for the Plaintiff on the Seizure, the Bill was dismist.

Anonymus. November 5.

Contempt discharged by a general Pardon.

PRocess issued till Proclamation was returned. Then came the General Pardon.

The Defendant appeared and demurred.

The Plaintiff moved to set aside the Demurrer; for tho the contempt was pardoned, yet the delay was no less to the Plaintiff.

The Lord Keeper. As to the Contempt, the Defendant stands rectus in Curia, and consequently all Contempts are likewise pardoned. Therefore proceed on Demurrer.

Anonymus. November 5.

A Rule, that if a second Answer be insufficient, Process shall go on where it was before.

THE Lord Keeper declared for a Rule, That if after Process of Contempt the Defendant put in an insufficient Answer, and so reported, the Plaintiff should not as formerly begin with Process at the Subpœna, but should go on to the Attachment with Proclamation and other Process, as if the Answer had not been put in.

Cox *against* Quantock. November 19.

A Devise to two Executors of *resid. bonorum*, one of them dies, the Administrator sues the surviving Executor for an Account.

A Devise to two Legatees equal, if it survives.

THE Testator had two Executors, and deviseth to them residuum bonorum, &c. after the Debts and Legacies paid; one of them died, his Administrator sued the surviving Executor to have Moiety of the Surplusage.

The Cause came to a Hearing. The Defendant insisted that the Executors were joint Devisees, and took the residue as Legatees, not as joint Executors.

The Lord Keeper decreed for the Plaintiff, for in case of Executors the Testator intended an equal share to his Executors; and by Chief Justice Rolls Advice it was decreed, That where a Devise was to two equally, notwithstanding

ſtanding which word Equally, the Deviſees were joint; yet the intention prevents the Survivorſhip.

The Cauſe was diſputed; but to the diſſatisfaction of the Bar decreed. For where the intention is ſecret and not declared, the ſecret intent muſt give way to the legal intent. And if an Adminiſtrator, then an Adminiſtrator de bonis non muſt have it, 19 November 1674.

Chalfont *againſt* Okes. November 21.

A Termor Grants the Eſtate in Truſt for himſelf for life, and after for his Wife for life, and after to their Child or Children for their lives, and after to J. S. and whether the Truſt to J. S. were good, the Lord Keeper took time to adviſe, and now delivered his Opinion that it was good. But if it had been to the Heirs of their Bodies, it had not been a good Truſt after ſuch Limitation to any other. He ſaid, that in this and the like Caſes the Chancery altred the Law; for at Common Law till Weldons Caſe in Plow. Commentaries Judgment was given againſt the Limitation, by Deviſe for a Term to one for life, the Remainder to another, and ſo over. But the Chancery decreed theſe Limitations good. But if it be in ſuch manner as to make a Perpetuity, that may neither be in Law nor Chancery.

Contingent Remainder of a Term.

Negus *againſt* Fettiplace. November 21.

FEttiplace, Tenant for life of a Rectory in the Right of his Wife, demiſeth the ſame to the Plaintiff for twenty one years, at 100 l. Rent, payable at Lady-day and Michaelmas; a fortnight before Michaelmas the Wife died; The Tenant ſent to Fettiplace notice thereof; Fettiplace and the Plaintiff came to an Agreement; on which Negus gave Bond to Fettiplace to pay 80 l. (Michaelmas Rent) to Fettiplace, and Fettiplace agreed to ſave him harmleſs againſt all others for that Rent, and now ſues to be relieved againſt the Bond, becauſe no Rent was due, and no conſideration for the Bond; and had a Decree againſt the Bond, though Mr. Attorny objected, and preſt it, that there was no Fraud, and the whole truth was known, and it was in foro Conſcientiæ. And the Tenant having

Bond to pay an agreement, and agreement to indempnifie him, relievied againſt the Bond without payment.

having taken all the Summer Profits, should pay for them, at least in proportion.

Cary *against* Appleton. November 26.

1. THE Husband deviseth the Jewels which were Paraphernalia of his Wife, and died. Decreed to the Wife.

2. The Husband devised his Goods to be sold for raising of Portions to be paid to his Daughters at their Ages of eighteen or Marriage, and that the same be raised out of his Rents, Issues and Profits of his Lease Lands, if the Goods were not sufficient, and the rest after Sale and Profits of the Goods and Leases, as aforesaid, to other uses. One Sister was paid, the other comes of Age, the Goods were not sufficient. The dispute was, Whether the Leases might be sold? For upon these Cases they are not to be sold, the Rents and Profits are liable.

Raise out of Profits implies a Sale. *Bertue* and *Stile* 28 *Jan.* 27 *Car.* 2. *in Cancell.*

The Lord Keeper. In the Lord Cornburys Case it was decreed, That the devise of Profits gave power to sell; otherwise if it be of the Annual Profits. A devise of the Profits, is a devise of the Land; and the Father did as much intend a provision for his Daughters as for his Son. And I take the difference where the devise is of the Profits of a Chattel Lease, and where of Lands, as in this Case. For if he had not directed a Sale, the Leases had been liable to the Portions, and so the affirmative words shall not bar a negative sense to exclude the sale of the Lease Lands.

Bokenham *against* Bokenham. December 4.

Conveyance by Tenant in Tail supplied.

EDmund Bokenham, the Plaintiffs Great Grandfather, made a Settlement of divers Lands and Mannors, inter al. Stockmash, which Estates descended to Sir Henry his Son, in Tail. Sir Henry in consideration of a Marriage to be had between Wiseman his Son and Grace Davies, makes a Deed of Feoffment, to the use of himself for life, the Remainder to Wiseman for life, the Remainder to the first, second, and other Sons by Grace. This Deed is indorsed generally (Livery made to J. S. appointed

pointed by Paul Dawes the Feoffee thereto,) The Marriage takes effect, Wiſeman and Grace have Iſſue Henry Walſingham, Paul the Plaintiff, and Hugh the Defendant, and ſix other Sons. Sir Henry after levies a Fine to Walſingham then his eldeſt Son; and this was to the uſe of Sir Henry and his Heirs. Walſingham dies, and he conveys the Mannor and Seignior to the Defendant, the fourth Son of Stockmaſh only, and dies. The Defendant enters, ſuppoſing that Livery was not well given, becauſe the Letter of Attorny to take Livery was loſt, as he ſuppoſed.

Lord Keeper decreed, 1ſt. That the Letter of Attorny ſhould be ſupplied, and Livery admitted; though it was objected, that this was in effect to decree a Diſcontinuance, which is a Wrong and an unlawful Act, and that it was,

Letter of Attorny and Livery ſupplied in Equity.

2d. To aſſiſt a Remainder Man in Tail in a third Remainder (for he was the third Son) againſt a legal Fine of his Father, Tenant in Tail, and whoſe Fine was a Bar to him in Law. And alſo againſt the acceptance of the Fine by Wilſingham, who joined with Sir Henry, who had power by the Recovery to have barred the Eſtate of the Plaintiff.

But to this laſt the Lord Keeper ſaid, The Grandfather might have the Conveyance made by himſelf in his own Hand; and its apparently ſo, for he recites in that Deed that he was Tenant in Tail, and he recites not the Feoffment made by himſelf.

Crofts *againſt* Wortley. December 9.

A Former Bill depending was pleaded in bar of a ſecond: But though both Bills were of the ſame matter and effect, the later had ſome new matter.

Former Bill depending, yet anſwer the ſecond Bill.

Ordered, That being the Plea was good, the Plaintiff ſhould pay the uſual Coſts of a Plea allowed. But the Defendant to anſwer the ſecond Bill, and the former Bill diſmiſt with 20 s. Coſts.

Anonymus.

1. Sequeſtration againſt the Heir.
2. Purchaſors with power to revoke.
3. Not againſt a Voluntary Conveyance.

THere was a Decree for 5000 l. on Account againſt the Father in Execution, whereof the Proceſs was carried to a Sequeſtration of the Lands, which the Father had at the time of the Decree, and ſetled on debate on the

Heir of the Father, though he also made Title thereto by Conveyance made to the Father.

The Question grew, Whether the Conveyance was revokable, or not? For if it were revokable the Lord Keeper would keep on the Sequestration, though the Decree was not for Lands, but for Personal Duty. And on producing several Conveyances, the Case was, That before the Suit, about 1663. the Father setled the Lands voluntarily on himself for life, the Remainder to his Son, with Remainder over; Provided he might by Deed revoke those Uses; but it was now farther insisted, (viz.) there was not express Power to limit other or new Uses, but only to revoke. Afterwards and before the Decree or Bill, the Father revokes the former Uses, and by the same Deed limits an Estate to his Son; In which second Deed there is no power of Revocation; but though it was voluntary and for natural Affection, was absolute.

Limitation of new Uses good, the express power being only to revoke.

The Question was, If the Limitation of new Uses was good, the express Power in the first Deed being only to revoke.

The Lord Keeper declared his Opinion clearly that it was, and therefore discharged the Sequestration.

DE

DE
Term. Sanct. Hill.
Anno Regis 26 & 27 Car. II.
IN
CANCELLARIA.

Sir James Bellingham *and Sir* Henry Allen *againſt* Elizabeth Lowther, ... Agnes, *Sir* John Wentworth. 14 January 1674.

9 Jac. SIR James ſetled certain Freehold Lands in Weſtmorland, to the uſe of himſelf for life, the Remainder to Henry his Son, and the Heirs Males of his Body, the Remainder to Allen his ſecond Son, and the Heirs Males of his Body, the Remainder to his own Heirs; and covenanted to ſettle Copyhold Lands in the ſame manner, and died 10 Jan. The Freehold was ſetled, but non conſtat the Copyhold were, but Sir Henry ſurrendred to the uſe of him and his ſequel.

1649. Sir Henry having ſuffered a Recovery of the Freehold, Covenants with Willoughby, &c. to ſettle the Freehold Lands on himſelf for life, the Remainder of part to Katherine his Wife for part of her Jointure, the Remainder to the Heirs Males of himſelf by Katherine; the Remainder to the Heirs Males of his Body, the Remainder to Allen, and the Heirs Males of the Body of Allen, the Remainder to the Heirs of Sir Henry, and covenanted with the ſame Perſons to ſettle the Copy-

hold by Surrender to himself for life, the Remainder to Katharine in full of her Jointure, the Remainder to the Heirs Males of Sir Henry by Katharine, the Remainder to the Heirs Males of Sir Henry, the Remainder to Allen and the Heirs Males of his Body.

Sir Henry Bellingham coming to make a Surrender of the Copyhold, fell sick by the way, but made a Letter of Attorny to others to do it, but died before it was done. The Freehold Lands remained to Sir James the Son, and the Heirs Male of Allen now exhibited their Bill against Thomas Lowther and John Wentworth, to whom the Copyhold Lands descended as Heirs general for want of Surrender. The scope of this Bill was to have Assurances of the Copyhold, and to be relieved against Actions at Law.

There were divers matters in the Bill, but this was the effect and substance of the Case upon the Plea. And it was said that this Covenant was but voluntary as to Allen, because he was no party to the Covenant, nor within the consideration of the Marriage or Portion. And it might be fraudulent as to Allen, and yet be good as to Katharine, and the Issues of the Marriage, as it was in Sir John Jacobs Case. And if one make a voluntary Conveyance to a younger Son, the same shall not be made good in Equity against the Heir at Law, if it be a voluntary Conveyance, and defective in Law; and if it had been executed by Surrender in the principal Case, yet Sir Henry might have cut it off by the Recovery.

Deed fraudulent as to one, and good as to another.

The Answer to these Objections endeavoured and offered was. 1st. That Sir Henry here expressly intended to preserve the Name and Male of his Family before his Daughters, though they should happen to be his Heirs; for he limits the Estate to his own Heirs Males, and immediately after to Allen, and his Heirs Males, which was likewise done by Sir James his Father, and that was consideration enough, (viz.) not only his Name, but his Blood as his Brother was; and the maintenance of his Name in his Blood was not only a good consideration, but such as prevailed with old Sir James and Sir Henry above the affection of the Heirs general: And the consideration of the Deeds of Covenant is not only the Marriage of Katharine, but continuing the Lands in his Name and Blood. And the Covenant binds Henry and his Heirs; and though the Covenant be with others, and not with Allen, yet the Covenant is obliging to the Heir, and puts a tie

a tie and obligation on Sir Henry and his Heirs, and so differs from a voluntary Conveyance without Execution; for there is no tie in that Case, no Man at all is bound by it: It is meerly void, and so is not this Covenant. And though it be true, that if the Surrender had been made, and thereby Henry Tenant in Tail, with Remainder to Allen, yet he might by Recovery have barred the Remainder; yet unless he had made some attempt that way, his intent and covenant stands still good, and differs from Worsleys Case fol. for there was an act and endeavour to cut it off, but no such here.

Difference between a Covenant to settle Lands, and a voluntary Conveyance.

Lord Keeper. Can the Plaintiffs amend your Case on proof?

Churchil, They cannot; for we admit the whole Bill.

Lord Keeper. If Sir Henry had had another Son by a former Wife, you could have no relief against him on this Covenant, which as to the Plaintiff is meerly voluntary, and matter of kindness. And if Sir Henry and Allen were both in life, Allen could not inforce Sir Henry to execute the Covenant; yet Katharine might; for it were to decree that to be done by Henry, which Henry might undo the next day; and so it was resolved in Hockleys Case, the younger Brother goes away with 1500 l. per annum, and the Heir general has but 200 l. per annum, Copyhold. And for the reasons given dismist the Bill 14 Jan. 1674.

Holloway *against* Collins. February 6.

A Legacy of 125 l. was given to the Plaintiff being but ten years old, and at that age was paid to the Plaintiffs Father, who after died insolvent, the Infant at full age sued the Executor of the Devisor for the 125 l.

A Childs Legacy paid to the Father, who failed, the payment decreed.

The Lord Keeper held it good payment: But was prest very much by the Attorny General of the ill consequence; for the Law must be the same if it were 1000 l. and extends to other Cases of like nature, not to Legacies only.

Lord Keeper, What should the Executors do?

Attorny General. May take security to repay it to the Infant, or sued to have it paid.

Lord Keeper. It may be so where Legacy will bear the charge of Suit, but not else, and delivered his Opinion accordingly. But the Defendant being put to prove the payment

payment, did prove likewise that the Executor took a Bond, which the Court prest the Defendant to shew. Whereupon the Sollicitor in the Cause said he had it not, but would produce it by the next day. But said it was a Bond to the Executor to save him harmless.

Lord Keeper. Then he paid the security at his own peril.

Churchil desired time to shew the Bond till the next day, for we may not trust the Judgment what the same is. It may be it is to pay his Infant at his age.

Lord Keeper. I shall believe the worst, unless you shew the Bond, and therefore decreed the Executor to pay it.

Hole *against* Harrison. February 17. *Et e contra.*

Three bound in a Recognizance, one is sued and paid the whole, another is insolvent, the third is sued for contribution, he shall contribute a moiety and not a third part.

HOle, Harrison and S. were bound in a Recognizance to the Chamberlain of London. The Plaintiff Harrison was sued thereon, and paid the whole Mony, and now sued Hole, who was bound with him for Contribution. Hole, Harrison and S. being all bound, and J. S. was dead insolvent, and S. was run away. The question was in what proportion the Contribution should be (viz.) of a third or moiety? Decreed a moiety, for S. is insolvent.

Sir ····· Holland *and his Wife against* Blandy. February 17.

THE Wife endowable of two Mannors in Surry and Stratton in the County of Wilts, which consisted of Copyholds, is endowed by Indenture of the Heirs of the Mannors in the County of Surry, and by parol Agreement was to have a third part of the Rents and Profits of Stratton, and the Rents were accordingly paid to her in proportion for thirty years and more. The Copyholders purchase the Inheritance of their respective Copyholds in 1647. and shall pay their Rents in proportion, during the ancient lives of the Copyholders they purchased for Mony, the lives being dead on which the Copyholds depended, the Plaintiff sued for the third part of the improved value. The Defendants pretend that they had no notice of the Agree-

Agrément, and being Purchasers without notice were not to be obliged thereby.

The Plaintiffs insist that they had notice, and so the payment of the proportion of the Rents proved, and it was publickly notified at the Courts of the Manor, and divers of the Tenants had abatement in their Purchase, though the Defendants denyed they had any.

At the Rolls the Plaintiff had a Decrée for the Rents and Improvements.

The Lord Keeper on Appeal reversed the Decrée as to the improved values, and confirmed it as to the Rents, and left the Plaintiffs to take their course for their Fines, for which there was an Agrément; but as he said there was none for the third part of the improved values. And it was then prest the Defendant must have paid Fines, if they had not purchased the Fée, and by their Purchase the Plaintiff, who but for this Agrément could have had Dower of the Lands, the Copyhold being determined, and the Act of the Copyholders shall not keep the Plaintiff from Dower and hinder her from Fines. And therefore it was prayed that some course might be taken in that.

The Widow of the Lord decreed to be endowed of the third part of the improved values of the Copyhold, but reversed by the Lord Keeper as to that.

Act of the Copyholder not to hinder the Lords Wife of Dower.

The Lord Keeper. I leave you to your Course.

Jacob *against* Thatcher. February 17.

The Plaintiff had a Joynture made by her Husband of Lands subject to a Judgment, which Thatcher purchased in, and did extend the Judgment, and took a Lease from the Husband, who dyed.

Purchaser without notice not protected.

Decreed that Thatcher shall not hold over by the Lease, since the Profits taken after the Extent were enough to satisfie the Judgment according to the true value, nor shall hold over by the Extent after the extended value to protect his Lease, although in truth he did purchase the Lease for valuable consideration, tho also he had taken a Lease first and for valuable consideration and without notice of the Joynture, and then had bought in and extended the Judgment, he might protect his Lease thereof. But Sir John Jacob and he (viz.) Thatcher, when the Extent is laid on, and in a way of satisfaction by the true value, shall not turn the Debt on the Joyntress. The Extent it seems was returned and filed, but Thatcher entred not but by a Lease subsequent.

Hixon

Hixon *againſt* Wytham.

CLement Wytham ſeized in Fee, made a Writing in this form, This Indenture made the day of, &c. between *Clement Wytham* of, &c. of the one part, and *James Orbel* of, &c. *William Skinner* of, &c. of the other part: Whereas there are divers Debts owing to *Clement Wytham*, and having an intention not only to raiſe Portions for his younger Children, but alſo to raiſe Mony for the payment of his Debts, although his perſonal Eſtate come not in: Now the ſaid *Clement Wytham* in conſideration of 5 *l.* doth grant, bargain and ſell to the ſaid *James Orbel* and *William Skinner* all thoſe Lands, &c. mentioning the Lands, but not Eſtate, on Truſt to ſell after his deceaſe, the Mony raiſed by Sale to be imployed as follows, and named divers perſons to receive ſeveral Sums, and the reſt of my ſaid Mony, and my Plate, and other my perſonal Eſtate of me the ſaid *Clement*, (and here in this part changeth the perſon, and ſpeaks in the firſt and not in the third perſon) I give and bequeath in manner following, and appoints to ſeveral perſons ſeveral Sums, and then addeth, I hereby name the ſaid *James Orbel* and *William Skinner* my Executors to the Uſes aforeſaid.

1ſt. It was queſtioned, whether this was a Will or not, being made in the form of an Indenture, and as above: But the Defendants deſerted that Point, and yielded that it was a Will, and the Lord Keeper accordingly.

2d. The Plaintiffs are Creditors of Clement the Teſtator, and ſued to be ſatisfied out of the Truſt, they not being named, and on his Sale, if the particular Legatées be paid, little or nothing will be kept; and there is no Clauſe in the Will that his Debts ſhould be paid: But on the other ſide the Words having an intention not only to provide Portions, &c. but alſo to pay his Debts, &c. and making his Executors to the Uſe aforeſaid, refer to the whole.

Lands deviſed for payment of Legacies, made ſubject to Debts.

The Lord Keeper pronounced this Decrée, That the Plaintiffs Creditors ſhould be paid before the Legacies, and not only in proportion, but before them; for a Man may not give but what is his own; but what he hath ultra, eſt alienum. Therefore the Legacies ſhall come into the Truſt after the Debts. But a Debt without Specialty, is as much

much as a Debt Jure naturali, and in Conſcience as a Debt by Specialty, and therefore there ſhall be an Equality with Debts by Specialty where Conſcience is the Judge. But the Lord Keeper being urged, that the Preſidents of the Court had been otherwiſe (viz.) that when Lands are to be ſold for payment of Debts and Legacies by Truſtees, the Legacies were in equal degree with Debts, unleſs it were ſuch Debts as charged the Lands; and the reaſon is, becauſe only the Will of the Owner makes the Land lyable, and gives no preferment to the one before the other. Thereupon the Lord Keeper gave time to preſent Preſidents to him.

Debts on ſimple Contract to be paid in proportion with Debts by Specialty where Lands are deviſed, &c. Whether Debts and Legacies are to be paid equally, where Lands deviſed for payment of both.

Leech *againſt* Leech. February 27.

THE Bill was by Truſtees to give and direct them in divers Truſts, and to protect them executing the ſame, which the Court now did (viz.) the Father made a Leaſe in Truſt with reference to his Will, and thereby deviſed to ſeveral of his Daughters 500 l. to each, to be paid at one and twenty years or Marriage, and if any or all dyed before, then to others. The Daughters had no other Portion, nor no Maintenance, and direction was prayed by the Truſtees, whether they might allow the Daughters Maintenance.

Where there is a Deviſe over of the Portion the Court can allow no Maintenance out of it; otherwiſe, if no Deviſe over.

The Lord Keeper. No: Becauſe of the Deviſe over; elſe it might have been done.

2. The Father Tenant pur auter vie made a Leaſe for 99 years, as was pretended, but was to A. and B. and their Heirs, habendum for 99 years, which Mr. Attorny preſt was void, and then the Truſt annexed to the Leaſe is void.

If a Truſt be for payment of Debts, it may ſupport a Conveyance, otherwiſe void.

The Lord Keeper. The Truſt is for payment of Debts and that ſhall ſupport the Truſt.

Truſt for payment of Debts generally good againſt an Heir though no Creditor party. But not ſo againſt a Purchaſer.

3. A Truſt for payment of Debts generally is good againſt an Heir, though no Creditor be Party to the Deed, nor Debt expreſſed in particular, nor Covenant in the Leaſe to pay.

But the Lord Keeper ſaid, he would not maintain it againſt a Purchaſer.

Whorewood *againſt* Whorewood. Febr. 22.

A Decree for Alimony *quouſque* Cohabitation. The Husband exhibits a Bill, and offers to cohabit.

Note, This in a time of the Commiſſioners who had this Juriſdiction eſpecially given.

IN the late times of the great Troubles, the Commiſſioners of the Great Seal, as they were then called, had Juriſdiction given them in the Caſe of Alimony betwæn Mr. Whorewood and his Wife. A Decræ was made that Mr. Whorewood ſhould pay 300 l. per annum to his Wife till they co-habited, and during their ſeparation, and aſſurances to be made for payment thereof, with Condition to be void in Caſe of Reconciliation and Cohabitation; but the aſſurances were made without theſe Conditions. Mr. Whorewood for ſix years paid not the 300 l. per annum. The Decræ was confirmed by the general Act touching Judicial Proceedings. Mr. Whorewood did not reſt there, but exhibited a Bill of Review, and thereon the Decræ affirmed, for the Bill was diſmiſt. Further ſtruggling was by Mr. Whorewood, and References, and now he exhibits this Bill that the 300 l. per annum might ceaſe, becauſe he offered to be reconciled, and deſired to co-habit with her, and uſe her as his Wife.

The Lord Keeper was aſſiſted now by Chief Juſtice North and Juſtice Rainsford.

On the Defendants part it was ſaid, that the Act being made when there was a Sulpenſion of Eccleſiaſtical Juriſdictions, the ſame was conferred to the Commiſſioners who were to act according to the Laws Eccleſiaſtick, and ſo ought this Court now to do; and it cannot be conceived when there is a Separation and allowance of Alimony quouſque, &c. that a ſingle declaration of the Husband without conſent of the Wife ſhould free him from Alimony, for then he might ſo declare and avoid the Sentence the next day: But it muſt be by her Conſent, or on clear proof that it is mær wilfulneſs in her, and that the fear ſhe had was juſtly removed, which in this Caſe appears by her Oath not to be. And ſhe had great cauſe to be in fear by ſixtæn years ſtrugling againſt the Sentence, and his Exaſperation by her Proſecution of him, and the Diſmiſſion of his Bill of Review had now forecloſed him to ſue for Relief by way of Original Bill: And the Decræ is for 300 l. per annum till Co-habitation by Conſent, which Cohabitation muſt be by mutual Conſent.

Reſolved

Reſolved 1ſt. That though the Aſſurances were abſolute without the Conditions or Limitations quousque, &c. yet the Deeds being in performance of the Decree (for ſo it was expreſſed in the Deeds) yet they ſhould be ruled and guided by the Decree.

Abſolute Conveyances guided by Decree that directed them.

2. That an Original Bill was proper in this Caſe, notwithſtanding the Bill of Reviw diſmiſt (viz.) the Court is inveſted with the ſame Juriſdiction which the Eccleſiaſtical Court had, and when a Decree is temporary and for ſpecial ends, an Original Bill lyeth to put a period to it, and to ſhew the purpoſes of the Decree ſatisfied.

Where a Decree is temporary or for ſpecial ends an original Bill lies to put a period to it.

3. That the Court could not diſcharge the Arrears.

Juſtice Rainsford was of Opinion, That neither the wilfulneſs of the Wife, nor pretences of kindneſs, or deſires of Co-habitation ſhould prevail either way, and therefore that a Tryal ſhould be made, and ſhe to be ordered to cohabit for half a year or the like, to ſee what would be; and the Decree of Alimony to be ſuſpended, and after ordered or ſuſpended, as there ſhould be occaſion.

The Decree to pay till cohabit, and now the Husband offers to cohabit, the Court cannot in this Caſe diſcharge Arrears.

North. The Decree hath no force but from the Conſent of the Parties, elſe the Eccleſiaſtical Court could not decree Alimony, as this Caſe is; for if they had decreed a Separation then they might alſo decree Alimony, but not Alimony alone ſaving pro expenſis litis. But here is no Sentence of Separation, and therefore the Husband in this Caſe may ſue his Wife ad obſequia debita in the Eccleſiaſtical Court, or ſue thoſe that detained his Wife at the Common Law notwithſtanding the Decree here.

No Alimony can be decreed, but by Conſent, unleſs firſt a Decree for Separation.

The Lord Keeper. I cannot decree a Separation. I ſhall not continue the Alimony to the Wife, if ſhe will not cohabit, nor decree the Wife to cohabit; but ſhall not diſcharge the Alimony or Sentence, but keep it in ſuſpence. But the Wife ſhall return to her Husband, who ſhall maintain and uſe her as a Gentleman and a good Husband ought to do, wherein if he fails, I will hear the Wifes Complaint with favour, and lay on the Decree again, as Cauſe ſhall be; but now ſuſpend, it ſaving to her the Arrears. But ſhe ſhall immediately return, and if not, ſhe ſhall have no benefit of the Alimony till ſhe do ſo, but take her remedy in the Court Eccleſiaſtical.

Erſwick *againſt* Bond. February 22.

A Covenant to ſecure the Purchaſer by other Lands not decreed.

ERſwick and his Wife ſeized in the Right of his Wife, conveyed the Lands to the uſe of himſelf for life, with power to make Leaſes, and ſold the Lands; and to ſecure the Purchaſer againſt ſuch Leaſes, as might have been made, took a Covenant againſt the Vendor that within two years he would convey other Lands to that intent; the two years being paſt and no collateral aſſurance made, next Term after the two years expired the Purchaſer exhibits his Bill to have collateral Security according to the Covenant.

Diverſity between Covenants for further aſſurance and collateral Security.

The Lord Keeper diſmiſt the Bill, and takes a difference betwen Covenants for further Aſſurance of the Lands ſold, and collateral Security of other Lands to incumber the Eſtate; and the two years being elapſed diſmiſt the Bill; Ex relatione Sir John Churchil of the Plaintiffs ſide.

Williams *againſt* Williams. February 23.

A new Bill after Diſmiſſion on Hearing on Suggeſtion of notice which was not in Iſſue in the former Cauſe.

A Former Bill was exhibited, thereby to ſet up an Agreement to charge the Defendants Lands. To which the Defendant ſet forth that he was a Purchaſer for valuable conſideration; and Iſſue being joyned thereon, the Defendant proved his Caſe, and the Bill was diſmiſt; and now a new Bill on the ſame Equity was exhibited; but now charges the Defendant that at the time of his Purchaſe he had notice of the Plaintiffs Equity (viz.) an Agreement, &c. it not being charged in the former Bill, and that the Defendant had notice, nor by the Defendant ſet forth that he had no notice, nor Examination to that point. The Proceedings in the former Cauſe were pleaded in Bar; for this Courſe will make Suits endleſs, and no Man will charge notice in the like Caſe, but try upon one Point firſt, (viz) Purchaſer or no: But the Plaintiff ſhould before Hearing have exhibited the Bill he doth now, but now it is too late.

Notice not denied, yet in Iſſue and not proved after Hearing, may have Defendants Oath on a new Bill.

The Lord Keeper over-ruled the Plea, with this further Declaration, that the Defendants Anſwer ſhould not conclude the Plaintiff; but though he denyed notice, yet the

the Plaintiff ſhould examine thereto. He ſaid alſo that in caſe Examination ſhould be made of notice, and no proof of it, if the notice had been denyed in the former Suit, yet the Plaintiffs Bill to have the Defendants Oath would lie, but then the Defendants Oath ſhould not be concluſive.

Maynard *againſt* Moſeley.

SIR Edward Moſely conveyed Lands to the Uſe of Thomas Leigh Eſquire, &c. and their Heirs on Truſt to raiſe 3000 l. for Mary (his only Daughter) and if he ſhould have more than one Daughter, then 2000 l. a-piece. He had Ann a ſecond Daughter and dyed: Ann dyed young and inteſtate, Sir Edward, Brother of Ann and Mary ſurviving Ann; afterwards Mary marrying unto Joſeph Maynard, Edward the Brother gave 5000 l. with her, and 7000 l. more he agreed to pay on Contingencies: Joſeph releaſeth to Edward the Brother all Demands and Portions which he may claim in Right of his Wife, except the 5000 l. and 7000 l. and other particulars. Young Sir Edward dyes without Iſſue, and deviſes his Lands to Moſeley the Defendant, and by ſuch death of Sir Edward the 7000 l. grew due. Mary takes Adminiſtration of her Siſter Ann and ſues for the 2000 l. and alſo the 4000 l. There were other Circumſtances of the Agreement by Sir John Maynard, Father of Joſeph, which induced the Court to diſmiſs the Bill as to the 4000 l. for the Leaſe for fifteen years, whereout the 4000 ſecured was in Joſeph Maynard in Right of his Wife; but as to the 2000 l. my Lord Chief Juſtice Hales and Vaughan agreed that it belonged to Mary as Adminiſtratrix, and the Agreement did not diſcharge it, for if a Stranger had taken Adminiſtration he ſhould not be barred, &c.

The Lord Keeper gave Reaſons for his differing in Opinion from the Judges, but decreed the 2000 l. according to the Opinion of the Judges.

This was a Bill of Review brought by Joſeph and Mary againſt a Decree made by the Lord Keeper Bridgman; and to which Bill of Review Moſeley demurred, and his Demurrer overruled by the Lord Chancellor the Earl of Shaftsbury, who was aſſiſted by Judges. The Cauſe was heard ab integro by the Lord Finch, aſſiſted by the two Chief Juſtices, ut ſupra, and decreed ut ſupra.

Another

Another part of the Caſe was decreed againſt Joſeph Maynard and his Wife, and was (viz.) Articles of Agreement were made betwen Sir Edward Moſeley and his Wife, Thomas Leigh, &c. Freinds of Sir Edward Moſeley, one for him, the other two Truſtees for the Lady, by which on Sir Edwards part, and on his behalf ſome Lands in Lincolnſhire were to be ſold for payment of his Debts and Annuities to be paid the Lady for Maintenance of her Children, and 400 l. per annum to the Lady for her ſeparate Maintenance and Joynture, of 5000 l. per annum out of ſeveral of the Lands for the Joynture of the Lady after Sir Edward Moſeleys death, and the Lady being ſeized in Fee of the Lands of 300 l. per annum in Derbyſhire. It was agreed that the ſame ſhould be ſetled, and that after her death it ſhould remain or deſcend to the ſaid Sir Edward, and the Iſſue betwen him and his Lady begotten and to be begotten, the Remainder to the Lady and her Heirs in ſuch ſort as ſhe ſhall not have power to alien from his and her Iſſue.

And after within the year an Indenture was made and ſealed by Sir Edward and the Lady and his Truſtees, whereby it was agreed, that Fines ſhould be levied of all the Premiſſes, and the Uſe for ſole ſeparate Maintenance, Annuities and Portions for Children and Joynture appointed according to the ſaid Articles; and for the Derbyſhire Lands the Uſe was to be to Sir Edward for his life, Remainder to the Lady for her life, Remainder to Sir Edward the Son for life, with Remainders to the firſt, ſecond, third, &c. and other Sons of Edward the Son, and the Heirs Males of their bodies, Remainder to the Daughters of Sir Edward, and his Lady in Tayl.

Afterwards croſs Suits aroſe in Chancery, the Ladies Truſtees Plaintiffs on the Lady's behalf againſt Sir Edward, and Sir Edward Plaintiff againſt them, in which the Annuities and ſeparate Maintenance are decreed, and that Fines ſhould be levyed according to the Articles and ſubſequent Deeds, and inrolled; but though the Lady had formerly joyned in Fines as well of the Mancheſter Lands out of which the ſeparate Maintenance as to 100 l part thereof was ſetled; as to the Lands to be ſold for Debts no Fine was levyed by the Lady of the Derbyſhire Lands nor of the Staffordſhire Joynture Lands by Sir Edw. but after the Decree the ſeparate Maintenance and Annuities were paid while Sir Edward lived, ſaving about 200 l. of the Annuities which were arrear at his death. And whereas no particular

ticular Lands were appointed by the first Articles for a Joynture, by the next Deed Manchester 100 l. per annum, and the Staffordshire Lands were limited to the Lady for her Joynture.

Sir Edward being dead, the Lady entred into the Staffordshire Lands and Manchester Rents, and held them whilst she lived, and received the Arrears of the Annuities.

After her death Sir Edward Moseley, Son and Heir of Sir Edward and the Lady were sued by the Creditors of the Lady, to whom she had bound her and her Heirs in Bonds to discover Assets of his Mothers Estate, particularly the Derbyshire Lands.

Heir at Law by Marriage Agreement became a Purchaser in Equity, and not lyable to pay Debts of his Ancestor.

To which by Answer he set forth the Agreements, Deeds and Decree, and that thereby he was a Purchaser in Equity for his life, with Remainder, &c. and not lyable to the Debts of his Mother as her Heir; and the Creditors proceeded no further. After which Sir Edward the Son mortgaged those Derbyshire Lands, and after devised them inter alia to Edward Moseley the Defendant.

Joseph Maynard and his Wife were Plaintiffs for the Derbyshire Lands, Ann the Sister being dead without Issue; and prayed to have Recompence for the Alienation against Edward Mosely Devisee, the Executor of Sir Edward Moseley the younger, upon the Equity. But although the Lady was not bound by her Agreement made during Coverture, yet when after the death of her Husband she received the Arrears according to the Agreements and Decree, and enjoyed the Staffordshire Joynture according to the last Deed, she was now bound by what she did being a Widow, and Sir Edward survived having on his Oath claymed those Grounds as Purchaser, and not as Heir to his Mother, and thereby freed himself from the Debts of his Mother, he might not if he had been sued by his Sister have claimed other Estate, and consequently his Trustee could not, and therefore the Sister ought to have the power to and in the Deed, and satisfaction for what it should cost her to redeem, he having devised his Lands for satisfaction of his Debts, Legacies and Engagements. But the Bill of the Sister was dismist by the Lord Chancellor Finch, Hales and Vaughan Chief Justices concurring. It was on Construction of the first Articles.

Feme though not bound by her Agreement during Coverture, yet acting according to the Agreement when a Widow, is bound by it.

Papillion

Papilion *againſt* Hix.

On a Plea.

HIX a Tinner in Cornwal articled with Papilion to ſell and deliver to him ſirtẽ Tun of Tyn frẽ from all Cuſtoms and Duties, part of the pẽice paid, the reſt ſecured to be paid. Hix after the Tin was ſeized, for that the Coynage had not bẽn paid, which by the Cuſtom of the Stannaries is a Forfeiture in caſe that the Tyn be ſold before Coynage paid or ſecured; and becauſe the Forfeiture was by Hix, Papilion ſued him to be relieved, he having covenanted to deliver it Cuſtom frẽe.

The Tinner articles to deliver Tin to the Merchant Cuſtom free; after delivery it is ſeized for Cuſtom, and the Merchant ſues to be relieved, but is not, for it is *in fraudem Regis*.

The Lord Chancellor diſmiſt the Bill. I will break this Trade betwẽn the Tinners and the Merchants; for by this Trade the King is cozened and the Coynage Duty ſeldom anſwered. The Tinner pays no Duty, ſelling to the Merchant in ſmall Ingots; and if it chance to be taken, he affirms he did firſt pay the Coynage, and then puts it into ſmall pieces eaſy to hide and tranſport: And if he be ſpied, pẽtends he coyned it, having firſt coyned two or thẽe Slabs, and all the reſt he tranſports and ſells in little pieces by colour of Coyning one or two Slabs. I will bẽak this Trade.

The Lord Keeper Finch.

Chamberlain *againſt* Chamberlain *and others.*

THE Caſe was, That Thomas Chamberlain Eſq; being poſſeſſed of Leaſes of 3000 years, and owing ſeveral great Debts, made his Will, and made his Wife Elizabeth his Executrix, who proved the Will, and paid the Debt as far as the Chattels Perſonal or Stock would reach, but no farther: And there being yet Debts unpaid above the value of the Leaſes, ſhe aſſents to a Bequeſt of the ſaid Leaſes made by the ſaid John Chamberlain in his ſaid Will, (viz.) to the ſaid Elizabeth for her life, and after to John Chamberlain the eldeſt Son of the ſaid John Chamberlain for his life, and after to the firſt Son of the ſaid

ſaid John Chamberlain the Son, and the Heirs Males of the firſt Son, after which aſſent Elizabeth dies and leaves Mr. Croft her Executor, who came to Articles with the Plaintiff to ſell the ſaid Leaſes to the Plaintiff for 900 l. whereupon the Plaintiff exhibits his Bill againſt the Defendant John Chamberlain the Son, and Thomas Chamberlain the firſt Son of the ſaid John Chamberlain the Son, and Mr. Croft the Executor. And now the queſtion was, Whether Debts being unpaid at the time of the ſaid aſſent, and nothing liable to make good the ſaid Debts ſaving the ſaid Leaſes, the Leaſes might be Aſſets in the Hands of Mr. Croft, ſo that he might ſell them to anſwer the ſaid Debts, notwithſtanding the ſaid aſſent; Or whether the ſaid bequeſt of the Leaſes were veſted in the Remainder, according to the ſaid deviſe by the aſſent, and could not be deveſted by the ſale of Croft the Executor.

And now the Lord Keeper declared and decreed Croft to convey according to his ſaid Articles to the Plaintiff, and that the ſaid Leaſes ſhould be Aſſets notwithſtanding the aſſent. And firſt he relied on this Rule of Court, That an Executor ſhall not be forced to pay Legatees until the Legatees ſhall give Bond to refund in proportion, or in the whole, for the ſatisfaction of Debts if any do appear unſatisfied. Yet the Legatee upon his Bill in the Court ſhall refund, and this as well as where it is Legative in ſpecie, as a Horſe, or a 1000 l. actually paid; for the Legacies are not due till the Debts be paid, and a Legacy being paid remains as a Legacy in the Hands of a Legatee after payment: And hence it is that a Legacy is not attachable by Foreign Attachment, being it may work a wrong to the Creditors, who are third Perſons, and can have no day in Court in that Suit to interplead. And for this reaſon if an Infant Executor aſſent, it is no good aſſent if there be not other Aſſets for Debts, which the Common Law provides for the ſecurity of Creditors, much more ſhall this Court provide for their ſecurity: But if after ſuch aſſent, John Chamberlain the Son had ſold the Leaſes to a third Perſon bona fide, this had defeated the Creditors, for he had a good Title in Law, and the Purchaſer ſhould not be prejudiced by this truſt for the Creditors. And in this Caſe it was alſo ruled, that if an Executor make a Devaſtavit, and die, his Executor is liable to make good of the quantum of the Devaſtavit to the Creditors, if he hath Aſſets from the firſt Executor.

Leaſes are Aſſets to pay Debts notwithſtanding the aſſent of the Executor to the deviſe of them.

Legatees ſhall give Bond to refund in caſe of dormant debts ariſing.

The nature of a Legacy.

Legacy not attachable by Foreign Attachment.

Infant Executor Aſſents to a Legacy.

Truſtee of a Term after the aſſent of the Executor ſells it *bona fide*, if good againſt Creditors

Executor of an Executor liable to a Devaſtavit made by the firſt Executor.

Note, A Caſe was cited, wherein it appeared that the Spiritual Court inſiſted to have ſecurity to anſwer Debts before the Executor ſhould pay the Legacy, and a Prohibition was prayed, but denied. And in this Caſe becauſe it appeared that the Defendant Thomas Chamberlain was not born at the time of the deceaſe of the ſaid John Chamberlain the Grandfather, nothing could veſt in the ſaid Infant, and therefore the whole Terms remained in the ſaid Defendant John Chamberlain; and for this reaſon the Bill againſt the Infant was diſmiſt.

Mortgagee forfeit ſhall have Intereſt for his Intereſt.

Note, This Hillary Vacation, a little before Michaelmas Term, the Lord Keeper declared it ſhould be the Rule, That a Mortgagee forfeit ſhould have Intereſt for his Intereſt, and ſhould be only accountable for what Profits he ſhould receive, and not for what he might have received, unleſs there were Fraud.

Mortgagee aſſigning, the Aſſignee ſhall have Intereſt for the Intereſt then due

And note, That it was always the Rule, That the Mortgagee aſſigning, the Aſſignee ſhould have Intereſt for the Intereſt then due, and never was contradicted but in Porter and Hobarts Caſe in the time of the Lord Shaftsbury.

Plea of Outlawry put in without Oath. Identities.

Note, The Lord Keeper ruled that a Plea of Outlawry ſhould be put in without Oath, becauſe of the Averments of the Identities of Perſons; and ruled that a Plea of the Priviledge of Oxford ſhould be put in without Oath, between Maſters and Buſh, 24 October laſt.

DE
Termino Paſchæ
Anno Regis 27 Car. II.
IN
CANCELLARIA.

Tanner *alias* Davis *againſt* Florence. April 19.

SIR Hugh Smith Grandfather to the Defendant and H. S. 21 Jac. made a Leaſe by Indenture to Arthur Tanner for ninety nine years, if Arthur, Elizabeth, and Thomas their Son, or either of them ſhould ſo long live. In which was a Covenant from him and his Heirs, That if Thomas died, living Arthur and Elizabeth to make a new Leaſe for years, if ſhe and Mary her Daughter ſhould ſo long live, and tenders the 20 l. and ſurrenders the old Leaſe, and dieth, the ſaid Mary, Adminiſtratrix of Arthur Tanner, being married to Davies, they ſue the Defendant for a new Leaſe, charging that they had notice of the Leaſe, 21 Jac. and Covenant.

The Defendant (viz.) Florence makes Title as Jointureſs by Conveyance made by the ſaid Sir Hugh for valuable conſideration, and of marriage to be had between Florence and William Son of Sir Hugh, of the Manor of Aſhton, whereof the Lands in queſtion are parcel; in which there is a Covenant againſt Incumbrances, except Leaſes or Copies determinable on three lives, and on the ſaid William and Florence, and the Heirs of William by Florence. And the Defendants deny notice of the Leaſe ſet forth by the Plaintiff, or of the Covenant, but believe

there was no such Lease or Covenant, because they have a counterpart of a Lease of the same Land to the same Arthur Tanner for ninety nine years, and determinable on the same lives under the same Rent. In which counterpart there is no such Covenant to renew, and other counterpart the Defendant never had.

The Land bound by Covenant.

This Case was heard by the Master of the Rolls, who decreed the Jointuress, and the Defendant Sir Hugh, Heir to the Intail, to make the Lease. From which the Defendants appealed to the Lord Keeper, who heard the Cause this 19th day of April, and affirmed the Decree.

Exception of Leases for three lives: In one of those there is a Covenant to renew, paying 20 l. It is notice implied, for they ought to see the Covenants.

For it was said, that it was a real Covenant that bound the Assignee at Common Law; which the Lord Keeper also affirmed. But was much denied by the Councel of the Appellant, for the Case of a Covenant to repair is nothing like, for there it concerns the Land during the old Lease in being, this a new Lease.

Lord Keeper. The exception of Leases, ut supra, gave notice of former Leases, and therefore you must take notice of the Covenants in them.

It was answered thereto, that the Exception is a Generality, not particular of this Lease, and is but for three lives; but this in effect is for four lives. And it might as well be good for five or six lives, or of the Inheritance; and the course in Purchases is to take such general Covenants; As in this Case when a Mannor is sold, it is not usual to peruse all Counterparts; and many times they are wanting, and then it will make it very difficult to sell a Mannor in the next Country. And if the Appellants are Purchasers without notice, the former Leases may answer for that, &c. Lord Keeper decreed it.

DE

DE
Term. Sanct. Trin.
Anno Regis 27 Car. II.
IN
CANCELLARIA.

Anonymus. July 11.

THE Plaintiff Executor for Children was to purchase Lands for them, and treated with the Defendant, who affirmed that the Lands were 250 l. per annum value, and offered to take a Lease at that rate for fourteen years; and did take it, and secured the Rent by Lands of lives worth 60 l. per annum, but paid not the Rent for five years. Whereupon a Re-entry was made according to a Condition in the Lease. And the Lands so entred into possessed for divers years. The Vendor could have no Relief, against the collateral security, unless payment were of the Arrears of the 250 l. per annum due before the Re-entry as well as after the Re-entry. The Lands sold being worth but 160 l. per annum.

Vendor of Lands takes a Lease of them at such a Rent, with condition of Re-entry, and gives collateral security for the payment of the Rent, and a Re-entry.

Vendor could have no relief against the collateral security without payment of the Arrears.

Dowdswel *against* Dowdswel. June 15.

THE Bill was to have certain Surrenders made, but not ingrossed, to be made up and ingrossed. The Plaintiff and Defendant were Brothers; and in this Case agreed by the Lord Keeper, that the Father being Lord of the Mannor could not declare the Trusts of Copyholds granted to his Son, tho he took the Profits always by their consent. Eadem die decreed between Holford & ..... Wright

Lord of a Mannor cannot declare a Trust of Copyholds granted to his Son.

Wright *againſt* Coxon. June 17.

Plea of Account ſtated, over-ruled though the Defendant but an Executor, and the Account ſtated by the Teſtator.

AN Account ſtated, and a Ballance thereon made, whereby 3000 l. was due to the Defendants Teſtator. And the Plaintiff recited the Debt by the Account, and covenanted to pay to the Teſtator, and now ſued to be relieved, ſuppoſing that 200 l. to be mentioned in the Account, and wherewith he was thereby charged, and that tho he was once charged therewith, yet at the time of the Account he was not, becauſe when he came home he found that his Servant had paid the 200 l. to the Defendants Teſtator, and that it was ſo entred in his Account-Book, but when he made the Account he had not his Books.

The Defendant by way of Plea ſaith, It was a ſtated Account, and the Ballance thereof ſecured by Writing under Hand and Seal; and that he being but an Executor, knew not how to account; and ſet forth, that he believed that his Teſtator upon his Accounts delivered up his Notes and Vouchers, and that no ſtated Account could ſtand in Court, if this or that particular of it ſhould be queſtioned.

Plea over-ruled with this, that the Plaintiff proceed no farther than Anſwer without leave of the Court.

My Lord Keeper over-ruled the Plea, and cited Backwel and Squires Caſe: But to proceed no farther than Anſwer, without leave of the Court.

Fowle *againſt* Green. June 17.

Heir ſhall join in ſale for Debts.

J. S. ſeiſed in Fee deviſeth the Lands to his Executors to ſell, and pay Debts. The Heir ſhall be compelled to join in the ſale. And the Lord Keeper ſaid, it was ſo ruled in Parliament.

Tirrel *againſt* Page.

All my Eſtate in a Will paſſeth a Fee.

A Deviſe of divers Legacies in Mony; and then a Deviſe followed of Lands. All the reſt and reſidue of my Mony, Goods and Chattels, and other Eſtate whatſoever, I give to J. S. whom I make my Executor, he having other Lands. Decreed by the Lord Keeper that the other Lands do paſs.

DE

DE
Term. Sanct. Mich.
Anno Regis 27 Car. II.
IN
CANCELLARIA.

Smith *againſt* Aſhton. November 15.

J. S. ſeized of Lands in two Counties, conveyed part to the uſe of himſelf for life, with Remainder, and power to charge the Lands ſo conveyed, with 500 l. by Deed or Will in Writing under his Hand and Seal. This Conveyance was voluntary, and without valuable conſideration, and after by his laſt Will in writing, not ſealed, deviſed the 500 l. to his younger Children, in whoſe right the Bill is exhibited againſt his Son and Heir to have the 500 l. Power not purſued decreed.

Againſt which the Councel for the Defendant inſiſted, that the Law was againſt the Plaintiff; and both Parties claiming under a voluntary Settlement, and the ſame conſideration, (viz.) Natural Affection, therefore he that hath the Law on his ſide ought not to be charged to the younger Children.

The Lord Keeper took time to deliberate, and now decreed the 500 l. tho the Will was not under Seal, and the power not legally purſued. He cited Prince and Chandlers Caſe, Decreed by the Lord Egerton, where there was a Power to make Leaſes on a Conveyance ſeiſed to uſes, on conſideration of Natural Affection, and the Leaſe was for proviſion for younger Children.

Decreed

Decreed good againſt the Heir, for two Reaſons, 1ſt. For that the Law was not then adjudged in Mildmays Caſe. 2d. Becauſe the Son did claim by the ſame Conveyance by which the Power was limited. So 17 June, 8 Car. the Jointure of the Counteſs of Oxford decreed good, where the Power was not purſued; yet only part of her Jointure depended on the queſtion.

For he that reſerveth ſuch a Power under Circumſtances, they are but Cautions that another might not be impoſed, or made without him. The ſubſtantial part is to do the thing, and therefore where it is clear and indubitable, the neglect of the Circumſtances ſhall not avoid the Act in Equity; poſſibly when from home or ſick he remembred not the circumſtance of his Power; and the Powers of this Land have a favourable conſtruction in Law, and not reſembled to Conditions, which are ſtrictly expounded; for a Power of this kind may be executed by part, and extinct in part, and ſtand for the reſt; but a Purchaſer ſhall defend himſelf in ſuch Caſe, but with difference, though not executed according to the Circumſtances; for if he hath notice (quære if he meant of the Original Conveyance only of the ill executed Eſtate) he purchaſeth at his own peril.

Smith *againſt* Aſhton. November 15.

Power not obſerved in Circumſtance, decreed.

RAlph the Grandfather of the Defendant, an Infant, had power by Deed, or Will under Seal, to charge Lands in Yorkſhire, (which by the ſame Conveyance he intailed on the Heirs Males) with Monies, not exceeding 500 l. He ſent Notes in Writting to J. S. to draw a Conveyance to Feoffees, but with Blanks for their Names, thereby to charge Lands in Cheſhire, called Wymondſly, with 1500 l. Portions for younger Children; and if they ſufficed not for 1500 l. to charge the Yorkſhire Lands with what was deficient. Deeds were prepared of Conveyances accordingly, and ingroſſed, but before they were ſealed or Names of Feoffees inſerted, he died. Richard his Son and Heir, Father of one of the Defendants upon Marriage with Beatrix, and 500 l. Portion, ſetled the Copyhold Lands on Beatrix, with an Intail to the Heirs Males of that Marriage, and dies. The Bill is by the younger Children for their Portions, having no

no other ſubſtance, nor è contra, Beatrix and her Son any at preſent, if the Plaintiff prevail.

The Bill charged the Notes in Writing to be the laſt Will of Ralph the Grandfather, but no mention in the Notes of any Reference of a Will, but a Conveyance, and a Conveyance prepared, but no Will.

On the firſt Hearing direction was given for a Trial at Law, whether the Notes were part of the laſt Will of Ralph, and a Verdict paſſed, that they were.

The Cauſe coming again to be heard, the Chancellor took time to adviſe, and now decreed the Cheſhire Lands to be ſold for payment of the Portions, and immediate poſſeſſion thereof to the younger Children, and the Infant to be charged out of the Yorkſhire Lands ſo far as 500 l. if the Cheſhire Lands ſufficed not by ſale.

1. Note, This was Decreed, though the power of charging, was not obſerved in the Circumſtance.

2. Note, A Will, and no Writing, mentions it to be ſo.

Anonymus. November 25.

A. Executor temporary, and after B. to be Executor. A. proved the Will, his Executorſhip ceaſed. B. might ſue without other Probate of the Will by him, by the Opinion of the Lord Keeper. And the Cauſe proceeded accordingly to a Decree of an Account. Executor B. Temporary.

Bullock *againſt* Knight.

BUllock for a Marriage to be had between Henry his Son, and Bridget the Daughter of Knight; and being poſſeſſed of a Leaſe of one thouſand years, articled to ſettle thoſe Lands in conſideration thereof, to the uſe and in truſt for himſelf till the Marriage, and after the Marriage to the uſe of himſelf for life, and after his death to Henry for his life, and after to the uſe of Bridget for her life, and after their deaths to the uſe of the Iſſue of their two Bodies to be begotten, according to the deſcent of Lands ſo intailed. The Marriage being had, the Leaſe was aſſigned to thoſe uſes. Then the

Father being dead, Henry the Husband granted his Interest over and dieth. Bridget surviveth and dieth. The Defendant takes Administration of Bridget. Bullock the Father was dead at such a time as Henry made his Grant. The Assignee sueth for the benefit of the Trust. And the dispute on Plea and Demurrer was, to which the benefit of the Trust belonged? There is no Issue living; but as I take it there was Issue born, but dead. And the Plaintiff made Title as Administrator also to the Issue.

Trust of a Term for a Feme Covert.

First, Sir John King for the Plaintiff objected, That the Trust of a Term limited to a Feme Covert was disposable by the Husband, and did bind the Wife for the Trust; for the Trust of a Term shall be of the same nature as the Term is.

Lord Keeper. I should not doubt if a Feme have the Trust of a Term for years, and marrieth, but to decree it to the Alienee of the Husband (sed quære if to the Alienee; but it seems it must be to execute the Decree to the Husband, and then the Husband may alien; but the Lord Keeper said as before) When a Term is setled for the Maintenance and Jointure of the Wife, the Husband shall never bind the Wife by his Alienation.

Trust of a Term to Issue.

2dly. It was debated, Whether the Trust limited to the Issue were here in nature of a Limitation, or by way of Purchase, so as the Issue born had then an Interest vested in him? For the Wifes Administrator could have no Title.

It was prest to be a Limitation, not a Purchase, the rather for these words, In course of descent.

Lord Keeper. An use to the Husband and Wife, and after to their Issue, they then having none, is all one as if limited to them and the Heirs of their Bodies; and the Issue takes nothing as a Purchasor.

3dly. Yet then it was objected by Sir John King, that the Husband may alien his part; but it was not to my intention fully enough prest that here the Articles were made before the Marriage, and consequently they took by divided moieties.

The Lord Keeper ruled the Plea good.

Jefferson

Jefferſon *againſt* Dawſon.

On a Plea.

PUrchaſer of Lands incumbred with a Statute, purchaſeth in a precedent Statute, having no notice of the firſt Statute. Purchaſe protected.

Lord Keeper. If he had notice of the ſecond Statute before he was dipt in the Purchaſe, he ſhall defend himſelf by the firſt Statute, whether the ſame were paid off or no; if he can at Law do it, Equity ſhall not help him.

Anonymus.

PRat deviſed his Houſes in Sepulchres Pariſh to Sir John Colledge, he being Tenant in Capite, and the Corporation miſnamed, which was a void Deviſe as to paſs the Lands, and ſo on former Proceedings by the Opinion of the Judges. Deviſe void by miſnomer of Corporation, ſupplied in Equity as a good appointment of a Charitable Uſe

The Lord Keeper notwithſtanding decreed it a good appointment for a Charitable Uſe, within the Stat. of 43 Eliz.

But then it was objected, that if ſo, yet then the Proceſs and Method appointed by the Statute ought to be held, (viz.) A Commiſſion and Inquiſition, and Decree by Commiſſioners, and ſo to come at laſt to a final Decree by the Lord Chancellor or Lord Keeper, but not to ſue by Original Bill, as in this Caſe.

But the Lord Keeper decreed the Charity, though before the Statute no ſuch Decree could have been made. Relief upon the Statute of Charitable Uſes by Original Bill.

Then the Defendants claiming not only as Heirs at Law, but by a Title paramount the Deviſor, It was decreed againſt him as to any Title under the Deviſor, but not againſt the other Title.

But it was farther decreed, that at any Trial at Law he ſhould not inſiſt or give in evidence the invalidity of the Deviſe. Referred to Law, and ordered, That the Defendant do not inſiſt on a Title ſet aſide by the Decree. He does inſiſt on it.

The Proſecutors for the Charity brought an Action at Law in the Common Pleas, where they made Title by the Deviſe; the Counſel for the Defendant not being informed before of the Decree, inſiſted that the Decree was void.

Whereupon the Plaintiff read the Decree, and the Plaintiff was non-suited, and then moved the Court of Chancery for a Commitment of the Defendant and establishment of the Possession, which was ordered, nisi causa.

For cause it was shewn, That the Trial was voluntary, and the Court had ordered no Trial, and the Defendants Councel were not apprised that the Defendants had bin served with the Decree, and were willing to go to a new Trial on the other Title, and prayed farther time to shew cause because of the shortness of time the given to shew cause.

Lord Keeper, You labour to get an Appeal to the King, and so to delay; Let the Order stand.

Clifford *against* Asbley, *and others.*

Fine and Non-claim bars a Trust.

George Low the Father being indebted 3000 l. for Profits of Lands which he received, by his Will devised, that if his Personal Estate fell short, that his own Lands in the Counties of Wilts, Hereford and Lincoln should be liable to make satisfaction. There was a Decree against George Low the Son for satisfaction out of the Lands, and he being dead, a Subpœna in the nature of a Scire facias is brought against the Defendant as Tenant. And all the Defendants but Asbley, as Tenants of the Lands to George Low, plead inter alia, that they are several Purchasers for a valuable consideration by Fine with Proclamation, after a Decree and Non-claim, without notice. And whether this was a good Bar was the question, and long debated.

Jones 14 *Car.*

Lord Keeper. 1. A Fine with Proclamation and Non-claim will bar a Trust, and so it was resolved in the Exchequer.

Entry on the Land by a *cestui que trust* is no sufficient claim.

2. And an Entry on the Land by a Cestui que trust, is no sufficient claim, but it must be by Subpœna.

3. But there is a Decree which is more than a Trust. And put case that a Man have a Judgment on Debt at the Common Law, on which he may have an Elegit. The Defendant after Judgment aliens the Lands by Fine and Proclamation, and five years pass; the Plaintiff may have a Scire facias and Elegit; and why not? So here I answer, That in case of a Statute or Judgment the Plain-

Plaintiff or Cognizee had no Interest in the Land; for if he release all his Right to the Land, yet he may sue Execution on the Land.

Much was said on the other side touching the inconveniency and ill consequence; on the one hand how dangerous it would be for Purchasers, and how much the Statute of Fines would be weakned; on the other side, how Decrees would be weakened.

The Lord Keeper took time to advise.

But Asbleys Plea was allowed, because as to the Lands, viz. Filherton Anger which he claimed, George Low Party to the Fine was but Tenant in Tail, the Remainder over to his Brother, under whom Asbley claimed by Fine without notice of the Trust or Decree.

Man *against* Cob.

THE Plaintiff Lord of the Manor of Finchley pretends himself Lord, and seised of Rents of the Defendants as Tenants of the Freehold. A Trial directed and found for the Plaintiff, and decreed that the Tenure and Seisin be admitted without farther Trial.

Tenure and Seisin of Rent admitted at a Trial.

Lord Keeper. Tenants use their Landlords badly now.

Anonymus.

THE Inhabitants of Sutton Cofield were incorporated by H. 8. and the Manor and Park granted to them in Fee, by the name of the Warden and Assistants, and the Grant was made to them; and it appeared by the Grant, that the same was for the benefit of the Inhabitants for sale of Cares, and relief of the Poor.

Grant to the Warden and Assistants for benefit of the Inhabitants, They cannot let without the Inhabitants.

A Suit was in the Star-Chamber touching misimployment and enclosing the Lands, whereby the Inhabitants were prejudiced; and there decreed that no farther Enclosure should be made without consent of the major part of the Inhabitants.

In King Charles the Firsts time some of the principal of the Inhabitants, Mr. Pudsey and others took a new Charter, leaving out the Inhabitants; and now the Warden and twenty three more made Leases, and Inclosures without consent of the major part. And the Plaintiff an Inhabitant

tant on behalf of himself and the rest of the Inhabitants do complain.

And the Lord Keeper decreed against the new Leases and Inclosures, and that no such should be without consent of the major part. And on Rehearing confirmed this Decree; for tho the Administration was in the twenty four, yet the Benefit was for the Inhabitants in general; But it was pressed much that the twenty four were the Corporation, and the Interest in them, and they might alien the Estate, and à fortiori Lease and Inclose; and it would breed contention and confusion if that the Multitude must intermeddle.

Anonymus. December 14.

Statute lost, not to be helpt by Motion, but Bill against all Parties.

THE Lord Keeper was moved touching a Statute lost to have it certified; and two Presidents were shewn.

Lord Keeper. They are Presidents not to be followed, and I will never do it. Exhibit your Bill against all that are concerned in the Land, and Justice shall be done you.

DE

DE

Term. Sanct. Hill.

Anno Regis 27 & 28 Car. II.

IN

CANCELLARIA.

Corniſh *againſt* Mew. January 28.

COrniſh ſeized in Fee deviſed Lands to A. for life, Remainder to B. in Fee. The Lands were before the Deviſe mortgaged in Fee for 100 l. and ſhe made A. Executor, and left Aſſets enough to pay the Debts, which B. in Remainder prayed it might go to the payment of the Mortgage, as in Caſe of the Heir, who ſhould be relieved upon the perſonal Eſtate in ſuch Caſe.

But the Court took a difference; there indeed the Heir ſhall be relieved, but not a Truſtee; and decreed Tenant for life ſhould be decreed one third, and he in Remainder two thirds, to redeem.

The ſame day another Caſe, where a Joyntreſs was of Land mortgaged, between Bertue and Stile, decreed that the Joyntreſs paying the Mortgage, ſhe ſhould hold over till ſhe and her Executor ſhould be repaid with Intereſt.

Difference between the Heir of a Mortgagors being relieved upon the perſonal Aſſets, and a Truſtee in ſuch Caſe.

Tenant for life decreed one 3d, and he in Remainder two thirds, to redeem.

A Joyntreſs paying off a Mortgage, decreed to hold over till ſhe be ſatisfied.

Brown

Brown *againſt* Vermuden. February.

Where a Pariſh is ſued, and four named to defend, and a Decree againſt them, one who claims under none of the four, conteſts the Decree.

Brown, Vicar of Worſelworth, ſued a Scire Facias and by Subpœna to have Execution of a Decree had by and on the behalf of one Carrier, his Predeceſſor for the tenth Dick of Lead Ore in the Pariſh, at the charge and labour of the Miners there (viz.) the Vicar to pay one peny a Dick. Carrier his Predeceſſor ſued divers Miners there, grounding his Suit by Preſcription. Four perſons were named by the Miners to defend the Suit for them, and a Decree paſſed againſt the four, for Carrier and his Succeſſors, that the Defendants and all the Miners ſhould pay. Vermuden, who owned and wrought a Mine there being ſerved, appeared and inſiſted that he is not bound by the Decree, for that he was not Party or Privy, nor claimed under any who was; and if he ſhould be bound, then the Parſon ought to be bound, if the Decree had been againſt the Parſon, which could not; becauſe the Parſon nor Ordinary were no Parties, and the Defendant could have no Bill of Review of it if it be erroneous, and therefore ought not to be bound.

The Lord Chancellor. 1. If the Defendant ſhould not be bound, Suits of this nature, as in caſe of Incloſures, Suit againſt the Inhabitants for Suit to a Mill, and the like, would be infinite, and impoſſible to be ended. And declared, that the Defendant, though no Party nor Privy, yet he may have a Bill of Review, becauſe he is grieved by the Decree.

2dly. The Defendant inſiſted on the Juriſdiction of the Dutchy Court, the Pariſh being part of the Dutchy, and the King had Cap. and Lat. as in Right of a Dutchy, and a Court of Revenue.

The Chancellor. It is within the County Palatine; this Court may hold Plea of Lands in the Dutchy.

3dly. The Court who made the Decree held the 1 d. per Dick too little, and ordered a Commiſſion to ſettle ſome more reaſonable recompence to the Miners, which never was executed. Non allocatur.

4. Sir

4. Sir John Heath was Tenant in Common with Vermuden, who ought not to be prosecuted alone. But the Defendant notwithstanding was ruled to perfect his Answer to the Interrogatories.

The Lord Chancellor. The Question is, Whether the Decree while it stands should be obeyed, not whether it be well made?

..... *against* Hawkes. February 11.

Relief for an Annuity against a Purchasor.

HAwkes in his Purchase had Notice of the Plaintiffs Annuity, for it was excepted in his Deed of Purchase, which contained part of the Lands charged, and divers other Lands. After Hawkes sold the other Lands not charged, and also some few Acres of the Land charged by general Words, and desired the Plaintiff and her Husband to joyn in a Fine to the person who bought them, and was assured by Hawkes, that the same would not prejudice her in the Lands setled on her: But this was proved by one Witness only, and his Depositions uncertain as to the particulars.

Also it was proved, that another person had also bought, and was in possession of three Acres of Land charged, and was no Party to the Bill; and that no Relief ought to be in Equity, because the Extinguishment of the Rent being a Rent-Charge was by the Plaintiffs own Act by a Fine. And however Hawkes could not be charged, there being no Apportionment to be made, the Tenant of the three Acres being no Party to the Bill.

Rent Charge not extinguished.

The Lord Chancellor. Here was no consideration for the Rent, and no Agreement to extinguish it; and when the Land was sold, it was sold for 800 l. of which 700 l. was paid to Hawkes. The Evidence was circumvented, and decreed Relief against Hawkes.

Richardson *against* Louther. February 12.

Alteration of Exhibits after Commission.

CErtain Exhibits of Writings were given in at a Commission for Examination of Witnesses. The Defendant suggested that the Exhibits were altered and interlined since the Commission executed, and prayed a Commission to examine that Point.

When the Party hath a Commissioner present, he can never examine new Interrogatories by Commission as to the Merits.

Objection. When the Party hath a Commissioner present, he can never examine new Interrogatories by Commission.

Resp. True as to the Merits. But this hath happened since, and not examined to by the Commissioner, not being then in being.

Object. How could the Defendant know this, but by discovery of his Commissioner, who ought not to discover the Examination?

But yet the Lord Chancellor ordered a Commission.

Taylor *against* Debar, *&c.* February 24.

A bad Title sold with Covenant for further assurance, and afterwards the Vendor purchaseth the good Title.

A Purchaser of the Crown Lands in the time of the late Wars, sells part to the Plaintiff, and covenants to make further assurance. He on the Kings Restitution for 300 l. had a Lease for years made to him under the Kings Title. The Decrée was, he should assign his Term in the part he sold.

DE
Termino Paſchæ
Anno Regis 28 Car. II.
IN
CANCELLARIA.

Anonymus. April 30.

A Creditor offered Proof of his Debt to the Commiſſioners of Bankrupt, which they diſallowed. Diſtribution was not yet made. It was alledged that the Proof was ſufficient, and moved that the Lord Chancellor would be attended by both ſides to hear and give Order therein. Proof of a Creditors Debt diſallowed by Commiſſioners, the Court will hear the proof.

The Lord Chancellor. Why ſhould I not leave it to the Courſe the Statute hath provided? If it be granted in one, it will be asked on all Caſes. Yet at laſt it was ordered.

Whitton *againſt* Lloyd. May 1.

A Deviſeth his Lands to his Executors towards payment of his Debts and Legacies.

The Lord Chancellor. Debts muſt be paid before Legacies: And decreed his Debts to be fully paid before his Legacies, and took a difference betwæn ſuch appointment made by Conveyance, and by Will. Debts before Legacies where Lands are deviſed.

Waller *againſt* Dalt. May 1.

A young Gentleman takes up Wares, *&c.* and relieved.

WAller a young Gentleman and two others imployed one Willis to borrow 500 l. Willis imployed Wiltſhire, who ſpoke to Dalt a Silkman, and bought of him Silks for 500 l. The Plaintiff gave Bond and Judgment for the Mony. Wiltſhire ſold the Silks for 250 l. and kept 50 l. for his and Willis's pains, and paid 200 l. to the Plaintiff. The Defendant never treated with the Plaintiff. And denyed on Oath that he ever treated about the Loan of Mony, and depoſed the Silks to be of 500 l. value or thereabouts, but Proof to the contrary.

Decreed only 200 l. and Intereſt (Quære for the Intereſt) and Relief againſt the Defendant quoad reſid.

DE
Term. Sanct. Trin.
Anno Regis 28 Car. II.
IN
CANCELLARIA.

Bulſtrode *againſt* Lechmore. June 4.

THE Bill was to diſcover an ancient Deed of Intail ſuppoſed to be in the Defendants hands, and that he had peruſed it, and that in diſcourſe he had acknowledged ſuch Deed and other like Charges.

Ingagement of Silence by a Councellor, he ſhall not be put to anſwer.

The Defendant ſaith by Plea, that he was a Counſellor with A. B. That on a Reference between the Parties, it was agreed that nothing that paſſed then, ſhould be made uſe of on either ſide, or be diſcloſed.

The Lord Chancellor ordered that what the Defendant knew only as Counſellor, or under ſuch Contract of ſilence, he ſhould not be put to anſwer.

Moor *againſt* Blagrave. June 9.

A Legatee of a Term ſued for it, but made not the Executor Party, and therefore the Bill was not good though the Executor to the Legacy was alledged in the Bill to conſent by the Plaintiff Aſſignee of the Legacy.

Legatee of a Term ſues, and the Executor no Party, not good, though charged that the Executor had aſſented.

Salisbury

Salisbury *againſt* Baggot. June 23.

AMong many other Queſtions, which aroſe in the Caſe, ſome were about the operation of a Fine with Proclamation and Nonclaim thereon, of which the Lord Chancellor having heard the Cauſe ſeveral days, took time to adviſe, and now declared his Opinion at large.

The Bill was to have Articles made on good and valuable conſideration ſixty years before decreed, by which the Lands in Queſtion were to be ſetled on A. the Father for life, Remainder in Tail to him whoſe Son and Heir the Plaintiff is.

Fine and Nonclaim.

The Defendants inſiſted on a Fine and Nonclaim, which the Plaintiff would inter alia avoid by Infancy of himſelf and of his Father, and of Entry made by himſelf within five years after the death of A. who was Tenant for life.

The Lord Chancellor in ſeveral other Points touching Notice, &c. was of Opinion for the Plaintiff, but diſmiſt the Bill on Conſideration of the Fine.

Fine and Nonclaim bars Equity and Truſts, *i. e.* where the Lands only are charged. But where the Lands are charged in reſpect of the perſon it bars not.

1. That a Fine and Nonclaim bars all Truſts and Equity, and ſo it was reſolved by all the Judges between Cary and Sir Thomas Thynn, where the Equity was of a practice in gaining a Conveyance of Lands, and ſince reſolved in the Exchequer, where a Truſt was barred, elſe no Man could know when he was ſure of an Inheritance: But this is on two differences:

1ſt. Where the Equity chargeth the Lands, as in the aforeſaid Caſes, there the Fine bars; but where it chargeth the perſon in reſpect of the Lands it doth not bar, as in the Lord Knowl's Caſe, wherein a Fine and Nonclaim barred not.

That Fine can never bar the Equity or Truſt which it creates. Claim of an Equity to avoid Fine can be no otherwiſe but by *Subpœna*.

2dly. If the Equity or Truſt be created by the Fine, that Fine ſhall never bar the Equity which it created. But the Objection that there is a Claim within the five years of the death of the Tenant for life, by the Iſſue in tail, helps not, in reſpect of the manner of Claim; for the Claim is to be of an Equity which can be made no other way but by Subpœna. In Caſes of lawful Entry or Action Equity makes not an Entry lawful. Entry of an Iſſue after Diſcontinuance is no Claim, but it muſt be by Formedon; the Statute hath taken away the Claim at Common Law ſub pede Finis.

2. The

2. The Claim in Equity in this Case is to have an Assurance or Conveyance made, which the Father of the Plaintiff might have sued for, being long ago, and that being vested in the Father, his Nonclaim thereto shall bar his Son the Plaintiff. But if the Conveyance had bæn made, then the Entry of the Plaintiff had been a good Claim to avoid the Fine, for no Man shall be enforced to take advantage of a Forfeiture. It is time enough for him in Remainder to enter after the death of Tenant for life. But here is no Title to the Lands, but an Equity to have the Conveyance of the Lands setled on a Lease for life, the Remainder in tail.

Quære. If the Party, who should make the Settlement, should die without Heir, or the like? And Quære, If one be entitled to have the Land conveyed, have not a Title to the Land in Equity?

Clotworthy *against* Mellish. June.

A Plea and three insufficient Answers, whether to be examined on Interrogatories.

PLea to part, and Demurred to part; the Plea overruled. Then the Defendant answered, and that being insufficient he put in another Answer, and that reported insufficient, he put in a fourth Answer: If the first be accounted one.

The Lord Chancellor did not commit him to be examined on Interrogatories.

Cavendish *against* .....

No Relief against an Award made without Order of Court unless for Corruption. Exceeding Authority, &c. for there the Parties chuse their own Jugdes; but if by Consent and Order of Court it shall be set aside if unequitable.

MAtters in difference referred by Consent and Order of the Court to Mr. Birch and two others, or any two of them. Two made the Award, and now Exceptions were taken to the Award on the one side, and the other side moved it might be decreed.

The Lord Chancellor. If the Parties without the Court refer the differences, they chuse their own Judges; and this Court relieveth not against the Award, unless it be in a Case of Corruption, exceeding Authority, or the like. But when a Reference by Consent and Order of Court, if it appear unequitable, this Court will not decree it. And accordingly in this Cause set aside the Award and Bond of Submission. The reason was, because it concerned

Award that he ſhall procure the Infant to convey when at Age, ſet aſide, becauſe unreaſonable. The Court will decree no Award to bind an Infant.

cerned an Infant, to whom 450 l. was awarded; and that Bond ſhould be given by the Guardian, that the Infant ſhould at his full age convey the Lands in Queſtion, which is not reaſonable; for he may dye; or if he live to age, refuſe to convey; ſo it is not mutual.

The Lord Chancellor alſo ſaid, He would never decree an Award which ſhould bind an Infant.

Popham *againſt Sir* John Hobert, *Nephew of Sir* John Hobert *deceaſed.*

Lands ſetled in Fee on Truſt, to ſell ſo much as the Truſtees ſhould think fit for payment of Debts and Legacies, and the Overplus to his Daughters and her Executors.

1. Whether the Truſtees can ſell more than is ſufficient.

2. The Daughter being dead without Iſſue, whether the Lands belong to her Adminiſtrator or her Heir.

THE Caſe was, Sir John Hobert had two Daughters, Dorothy (married in his life time to Sir John Hele, whoſe Grandchild and Heir the Plaintiff married) and Philippa. And having ſuch Iſſue, ſetled divers Lands in Norfolk on Truſt in Fee, that they and the Survivor of them within two years after his deceaſe ſhould ſell, as they ſhould think fit, and that the Monies raiſed by Sale, and the Profits in the mean time ſhould be imployed towards payment of his Debts and Legacies that ſhould be left unpaid by his Executors; and the Overplus, after ſuch Debts and Legacies paid, to ſuch perſons as he ſhould appoint by his Will; and in default of ſuch appointment, to Philippa and her Executors, which he after by his Will confirmed, and dyed in 1647.

Philippa marryed the Defendant in 1647. and after her Fathers death had Iſſue by him, and dyed, and then the Iſſue of Philippa alſo dyed an Infant without Iſſue.

The Defendant took Adminiſtration to his Wife. The Truſtees had paid off ſome Debts and ſold ſome Lands; ſome Lands remained unſold, and ſome Debts unpaid. The Defendant obtained from the Truſtees a Conveyance of the Lands, becauſe the Surpluſage of the Mony of the Lands ſold was to go to his Wife, her Executors and Adminiſtrators.

The Plaintiff and his Wife as Heirs to the Teſtator, and Philippa the Wife, prayed an Account, and to have the Lands unſold. To which the Defendant pleaded the Matter.

The Lord Chancellor ordered the Matter to be put in by way of Anſwer.

Reaſons

Reaſons againſt the Plea were urged.

1. The Lands are not appointed to be ſold abſolutely, but to be ſold as the Executors ſhould think fit, which is all one as if it had been ſold, if they find occaſion for payment of Debts and Legacies. But in ſuch Caſe they have not a pure and abſolute Power and meerly Arbitrary, but ſubject to the Rules and Laws of Equity; for in caſe the Eſtate perſonal would ſuffice to pay the Debts, they may not ſell the Land and pay the Debts with that Mony, and keep the perſonal Eſtate to themſelves.

Power to ſell Lands ſubject to the Rules and Laws of Equity.

2dly. And as they are reſtrained from ſelling in caſe the perſonal Eſtate can pay all, ſo if it will pay part proportionably according to reaſonable circumſtances, in that Caſe they may ſell, and not otherwiſe. Quære therefore if the Executors ſhould not be made Parties.

3dly. When Philippa the Wife died, the Surplus or neceſſary Sale will belong to the Adminiſtrators; but it did not lie in the power and election of the Husband, her Adminiſtrator or Truſtees to ſell without neceſſity, and thereby to give in effect the value of the Lands, or the Lands themſelves from his Child that ſurvived her, and was Heir to the Husband, and thereby diſinherited the Child, and in effect intitle the Adminiſtrator to the Lands by way of Bargain.

4thly. Put caſe the Husband had died before the Wife, and a Collateral Kinſman had taken Adminiſtration to the Wife dying after her Husband, he might as well have done it as now the Husband has done, he could not with any colour have had the Lands, and the Husband hath no other Title, but what ſuch Stranger ſhould have (viz.) as Adminiſtrator, not as Husband.

5thly. No Adminiſtrator in ſuch caſe is to be preferred before an Heir. The Heir ſhall enforce the Adminiſtrator to preſerve the Inheritance from Sale by the Perſonal Eſtate to pay Debts.

Objection. The Name is preſerved, ſhe marrying a Hobert.

Anſwer. The Marriage was two years after the Teſtators death, and therefore could be no conſideration of this Bequeſt; for ſhe might have married any other Perſon, and ſuch Husband ſhould have as much right as Sir John Hobert.

The Title that the Son had while he lived, deſcends to the Plaintiff as his Heir, and did ſo deſcend before the

transaction between the Defendant and the Truſtees, and the Truſtæs might not make then whom they pleaſed Heir to the Lands.

The Husband without a Fine by the Wife, could not bind the Wife and her Heirs to take from her the power to clear the Eſtate and payment of the Debts, nor conſequently to bar her Heir thereof.

Brown *againſt* Vermuden.

Tithe of Lead Oar.

BRown Parſon of Worſelworth exhibited a Bill againſt Vermuden to have perfomance of a Decræ obtained againſt certain Perſons Workers and Owners of Lead Mines in Derbyſhire, whereby a certain manner of Tithing of Lead Ore was decreed, not only againſt the particular Perſons named Defendants, but all other Owners and Workers.

Vermuden pleaded inter alia, That he was a Stranger, and claimed not under any Party or Privy to the Bill, and therefore inſiſted he ought not to be proſecuted by a Bill not grounded on the Fact and Title, but on the Decree in the nature of a Scire facias.

This Plea was formerly over-ruled by the Lord Chancellor, vide fol. 272. But a Commiſſion granted to examine the quantity and value of the Oar, and the Plaintiffs Title, if Parſon, &c. The Six Clerks appointed time and place, but the Defendants Witneſſes were ſo aged, that they could not come to the place, and therefore a new Commiſſion prayed.

Commiſſioners adjourn.

Lord Chancellor. The time and place is only for the firſt meeting of the Commiſſioners; but after they may adjourn to another time or another place.

The

The Lord Keeper Finch.

Giles Thornborough *Clerk, and* Jane *his Wife, Daughter and Heir of* Lawrence Clifton *Gent. Plaintiffs,* John Baker *Son and Heir of* James Baker, *and* John Nichols *Esquire, and* Sarah *his Wife, Administratrix of* James Baker *Defendants.* July 10.

THE Plaintiffs Bill being, That the said Lawrence Clifton by Indentures of Lease and Release between him and the said James Baker, bearing date the 20th and 21th of October 1656. in consideration of 500 l. paid to him by the said James Baker, did convey to the said James Baker and his Heirs several Lands in Stoak in the County of Surry; and by another Indenture executed at the same time between the same Parties, it was agreed between them, that if the said Lawrence Clifton should during his life pay to the said James Baker, his Heirs Executors, Administrators or Assigns 30 l. yearly at Lady-day and Michaelmas, or within thirty days after, by equal portions, and if the Heirs of the said Lawrence should within six months after the death of the said Lawrence pay to the said James Baker, his Heirs, Executors, Administrators or Assigns, the Sum of 500 l. with Interest since the paying the last 15 l. then the Lease and Release should cease and be void; and about one year after the said Lawrence Clifton died, leaving the said Jane his only Daughter and Heir: And by another Indenture bearing date the 25th of May 1658. made between the now Plaintiff and the said James Baker, did covenant with the Plaintiff, that if they or either of them should pay to the said James Baker, his Heirs, Executors, Administrators or Assigns the Sum of 20 l. only on the 20th of October then next following, and the Sum of 530 l. on the 20th of October 1659. that then the said Indenture of Lease and Release should be void: And the said James Baker died about May 1659. and the Premises being forfeited, they descended to the said Defendant John Baker, Son and Heir to the said James; and the Defendant Sarah, the Relict of the said James Baker, having administred of

his Eſtate granted to her, her ſaid Husband John Nichols, and ſhe does pretend to the ſaid Mortgage, and the Plaintiff praying a Reconveyance on payment of what was due, the Defendant John Baker by his Anſwer confeſſing the Mortgage and Agreements aforeſaid, and that the Mortgage being forfeited deſcended upon him as Heir to his Father, and ſubmitted to reconvey the Premiſes on payment of Principal, Intereſt and Coſts to him, the Defendant and John Nichols and his Wife confeſſing the ſaid Mortgage, and inſiſting that the ſaid Sarah was Adminiſtratrix to her former Husband, and thereby intituled to the ſaid Mortgage Mony and Intereſt, although he hath other Aſſets of her Husbands Eſtate, with a conſiderable overplus.

It was upon the hearing of the Cauſe the 11th of February in the twenty third year of his now Majeſties Reign, decreed by the Maſter of the Rolls, That upon payment of Principal, Intereſt and Coſts, The Defendant John Baker ſhould reconvey the Premiſes. And it was then farther ordered, that the Party ſhould attend the Right Honourable the Lord Keeper of the Great Seal of England for his Lordſhips Directions, Whether the Principal and Intereſt ſhould be paid to the Defendant John Baker the Heir, or to the Defendant Sarah, the Relict and Adminiſtratrix of the ſaid James Baker; ſince which the ſaid Principal and Intereſt having been paid by the Plaintiff, and a Reconveyance made unto them, but the queſtion betwen the Heir and the Adminiſtratrix being not ſetled, Now upon hearing and full debating of the matter this preſent day by Counſel learned, as well for the Heir as the Adminiſtratrix, whether the ſaid Principal Mony and Intereſt doth belong, and ought to be paid to the Heir or Adminiſtratrix, and the former Preſidents being produced, the Lord Keeper having been attended with the ſaid Cauſe and Preſidents, and having taken time to conſider thereupon, did now declare, that the Mortgage ought to go to the other Defendant John Nichols and his Wife, the Adminiſtratrix of James Baker, and not to John Baker Son and Heir of the ſaid James Baker; becauſe the Reaſon of the Common Law in theſe Caſes ought as near as may be to be followed in Equity. Now by the Common Law, if the Conditions or Defeazance of a Mortgage of Inheritance be ſo penned, that no mention is made either of Heirs or Executors to whom the Mony ſhould be paid, in that caſe the

Equitas ſequitur Legem.

the Mony ought to be paid to the Executrix, in regard that the Mony came first out of the Personal Estate, and therefore usually returns thither again; but if the Defezance appoints the Mony to be paid either to Heirs or Executors disjunctively, there by the Common Law if the Mortgagor pay the Mony precisely at the day, he may elect to pay it either to the Heirs or Executors, as he pleaseth: But where the precise day is past, and the Mortgage forfeited, all Election is gone in Law, for in Law there is no redemption. Then when the Case is reduced to an Equity of Redemption, that Redemption is not to be upon payment to the Heirs or Executors of the Mortgagee at the Election of the Mortgagor, for it were against Equity to revive that Election, for then the Mortgagor might defer the payment as long as he pleaseth, and at last for a composition by payment of the Mony to that Hand which will use him best, much less can the Court elect or direct the payment where they please, for a Power so Arbitrary might be attended with many inconveniencies throughout. Therefore to have a certain Rule in these Cases, and a better cannot be chose than to come as near unto the Rule and Reason of the Common Law as may be. Now the Law always gives the Mony to the Executor where no Person is named, and where the Election to pay to either Heir or Executor is gone and forfeited in Law, 'tis all one in Equity as if either Heir or Executor were named, and then Equity ought to follow the Law and give it to the Executor, for in natural Justice and Equity the principal right of the Mortgagee is to the Mony, and his right of the Land is only as a security for the Mony; wherefore when the security descends to the Heir of the Mortgagee, attended with an Equity of Redemption, as soon as the Mortgagor pays the Mony the Lands belong to him, and only the Mony to the Mortgagee, which is meerly personal, and so accrews to the Executors or Administrators of the Mortgagee. And for this reason a Mortgage of an Inheritance to a Citizen of London hath been held to be part of his Personal Estate, and divided according to Custom. And tho it may seem hard that the Heir should part the Land, and be decreed to make a Recompence without having the Mony which comes in lieu of the Land, yet it will not seem so to them who consider that the Land was never more than a Security, and that after payment of the Mony the Law keeps a Trust for the Mortgage, which the Heir of the Mortgagee is bound to execute; and his Lord-

Where the Mortgage Mony shall be paid to the Heir or the Executor, in Law or Equity. Elective.

The nature of a Mortgage.

Mortgage of an Inheritance to a Citizen of *London* part of his Personal Estate.

ship

ſhip declared that the Right to a Sum of Mony, which is a Perſonal Duty, ought always to be certain, and not to be variable upon circumſtances. Wherefore his Lordſhip did not think it material that the Adminiſtratrix in this Caſe had Aſſets without this Mony, for Aſſets or not Aſſets is not the meaſure of Juſtice to Executor or Adminiſtrator, but ſerves only as a pretence to favour the Heir, who either ought to have the Mony if there be no Aſſets, or not to have it tho there be Aſſets. And for the ſame reaſon his Lordſhip did not think it material that there wanted Circumſtance of a Perſonal Covenant from the Mortgagor to pay the Mony, for that the Caſe of the Adminiſtratrix of the Mortgagee had been ſtronger with it, yet it is ſtrong enough without it. His Lordſhip declared that he had conſidered the various Preſidents in this Caſe which had been urged, whereof one did not come to the very Point, there being a great difference between a Mortgagee and an abſolute Conveyance with a Collateral Agreement to reconvey upon repayment of the Purchaſe Mony, the other late Preſidents which made for the Heir being contrary to the more ancient Preſidents of this Court, and to ſome Modern Preſidents alſo, which ſeemed to his Lordſhip of more weight, his Lordſhip being of Opinion that all Mortgages ought to be looked upon as part of the Perſonal Eſtate, unleſs the Mortgagor in his life-time, or by his laſt Will do otherwiſe declare and diſpoſe of the ſame. Wherefore, and upon the whole matter, his Lordſhip having fully weighed the Preſidents, and what was ſaid on either ſide, Doth order and decree that the Mortgage Mony and Intereſt ſhall be paid unto the ſaid John Nichols and his Wife, and kept by them, and that what Security hath been given by either of them concerning the diſpoſing of the ſaid Monies and Intereſt, or the abiding the Order of this Court, as to the payment of the ſaid Mony and Intereſt, be delivered up to them and cancelled.

Difference between Mortgagee and an abſolute Conveyance with a Collateral Agreement to reconvey.

Mortgages lookt upon as part of the Perſonal Eſtate.

DE

DE
Term. Sanct. Mich.
Anno Regis 28 Car. II.
IN
CANCELLARIA.

Biſco *againſt the Earl of* Banbury, *Son and Heir of* Nicholas *Earl of* Banbury. 24 October.

ON hearing the Cauſe by Appeal from a Decree formerly pronounced by the Lord Chancellor. The Caſe was,

Edward Lord Vaux, Father of Nicholas Earl of Banbury, on the Marriage of Nicholas his Son Earl of Banbury, and Elizabeth Wife of the ſaid Lord Vaux, Father and Mother of Nicholas, with Iſabel Daughter of the Lord Mountjoy, in conſideration of the ſaid Marriage, and 8000 l. Portion, inter alia, ſetled the Manors of Great and Little Harrowden to the uſe of Nicholas and Iſabella for their lives, the Remainder to the Earl of Salisbury, and others, the Survivors of them for ninety nine years, in truſt, to raiſe 6000 l. for Portions for the Daughters of the ſaid Marriage, the Remainder to the Heirs Males of the ſaid Nicholas by Iſabel, with Remainder over, the Remainder to the Lord Vaux in Fee.

A truſt for raiſing a Sum of Mony on a term which happens to be void, transferred by another term, whereon the Grantor had power to charge it.

29 January 1651. Nicholas and Iſabel in conſideration of their Marriage formerly had, and a Portion of Mony paid, and natural affection, convey the ſaid Manors to Ruſſel, and Rich and Lake, to the uſe Nicholas for ninety nine years,

years, if he lived so long, the Remainder to Isabel for her life, the Remainder to Russel, Rich and Lake for the life of Nicholas to preserve the Contingent Remainders after limited, the Remainder to the first, second, &c. and other Sons of Nicholas by Isabel, and the Heirs Males of their Bodies, the Remainder to Russel, Rich and Lake for ninety nine years, with Remainder over. The Trust of this Term, to the use of such Persons to whom the Sum of 6000 l. as the said Isabel according to a Proviso should appoint.

The Proviso was, That if Nicholas or his Heirs, or other Person, Owner (of the Reversion on the ninety nine years) should pay such Sum, not exceeding 6000 l. as Isabel by her last Will in Writing should appoint, whether she was Covert or Sole, then the Lease to cease, and until such payment to the use of those Persons, &c.

Proviso, That Nicholas with consent of Isabel, Russel, Rich and Lake in writing express, may revoke all and every the said Uses, and limit new.

14 January 1652. The Lady according to that Proviso revokes all the Uses in the Deed, 20 January 1651. and declares that a Fine and Recovery was to be had to the use of Russel, Rich and Lake, and their Heirs, in Trust, That they execute a Deed prepared to be dated 28 February instant, for securing of 2000 l. to Sir Thomas Hewet of part, and to stand seized of the residue to the Uses in the Covenant of the 29 January 1651. and then to convey the Premises accordingly.

18 February 1652. Part of the Premises are demised by Russel, Rich and Lake to Sir Thomas Hewet for five hundred years for securing the 2000 l. with power of Redemption on payment.

In this Conveyance Nicholas, Isabel, the Lord Vaux Father of Nicholas, and divers other Persons join. And in this Indenture it is recited, that the said Nicholas according to power in a Deed 28 January 1651. he the said Nicholas by Indenture dated 24 February, with consent had revoked every the Uses in the Indenture, 20 January 1651. and declared the Use thereof to Russel, Rich and Lake, and their Heirs, to the intent to join in and execute the security therein mentioned, and afterwards to convey to the Uses in the tripartite Deed mentioned, that is, the Deed 29 January 1651. as by the said Indenture of Revocation appeareth.

13 January

13 January 1651. There are divers other Recitals, & inter alia, a Leaſe of the ſaid Manors made 13 February 1651. to Engrim and others for years, determinable on the death of Nicholas Earl of Banbury. And it is agreed that till default of payment of the 2000 l. to Sir Thomas Hewet, the Profits of the ſame ſhould be diſpoſed according to the Truſt in that Indenture (viz.) for the ſaid Nicholas, &c.

Anno 1653. Nicholas, &c. conveys the ſaid Manors to the Uſes mentioned ſupra, (viz.) to the uſe of Nicholas for life, the Remainder to Iſabel for life, the Remainder to Ruſſel, Rich and Lake for the life of Nicholas to preſerve Contingent Remainders to firſt, ſecond, third, &c. Sons of Nicholas, &c. ut ſupra, the Remainder to Ruſſel, Rich and Lake for ninety nine years, then next, and that Ruſſel, Rich and Lake during the ſaid Term ſhould imploy the Rents and Profits of the Premiſes to the raiſing of ſuch Sums of Mony as Iſabel by Will in Writing, or other Writing ſhould appoint, and at ſuch time, and in ſuch manner, and to ſuch Perſons ut ſupra, and in default of payment at ſuch times the Perſons to whom, &c. to take and receive the Profits prout ſupra.

Proviſo of Revocation in terminis prout ſupra.

The Lady Iſabel by Will appoints payment of the 6000 l. to the Plaintiffs, and others, and ſhe dieth. Nicholas on treaty of Marriage to be had with the Countels and 4000 l. Portion, covenants to levy a Fine of the ſaid Manors to the uſe of Nicholas for life, the Remainder to the Defendant for her life for her Jointure, the Remainder over in Tail.

In this Aſſurance are the Incumbrances excepted of the ninety nine years, and 6000 l. Daughters Portions in the Deed 1649. and the Mortgage made to Sir Thomas Hewet for 2000 l.

The Bill is now to have the other Sum of 6000 l. limited by the Deed 1653. and appointment thereof by Iſabel Harvey ſurviving Truſtee of the firſt ninety nine years, and the Leſſees by the Deed 1653. for ninety nine years, and the Lady Jointreſs are Parties.

The Cauſe was formerly heard, and a Decree pronounced by the Lord Chancellor for the Plaintiffs, and now confirmed by him with great earneſtneſs, and not without ſome reflection on the Defendants Councel, as if the Fact was more regarded than the Juſtice of the Cauſe.

The Points moved were, That the Truſt to raiſe the 6000 l. in queſtion was appointed to be raiſed out of an Eſtate for ninety nine years, which falls out to be a void Eſtate; for it is for the ſame Term when the former Eſtate for ninety nine years to the Earl of Salisbury did commence (viz) after the death of Nicholas and Iſabel, which now in event of the Cauſe (Nicholas having no Iſſue by Iſabel) falls out to have the ſame beginning and ending with the former; but two Terms at one time cannot be in poſſeſſion for the ſame time; and the Limitation is not that the ſaid Manors ſhall be to thoſe Uſes, but the Truſt ſeems to be reſtrained to the Eſtate of ninety nine years limited by the Deed, and to thoſe Perſons (viz.) Ruſſel, Rich and Lake, who ſhould during the Term to them limited, raiſe, &c. And where there was no Eſtate, no Truſt could be annexed, nor could there be Truſtees of that Eſtate which had no being: It were to ſuppoſe Accidens ſubſiſtere ſine ſubſtantivo in quo exiſtat, and it were Coloratum ſine Colore; and it could not be equitable to make the firſt ninety nine years liable to this 6000 l. for there is no ſuch thing appointed by the firſt ninety nine years. And the Plaintiff here claims by a voluntary Conveyance without any Agreement or Contract precedent for the doing thereof; but the Defendants claim upon a valuable conſideration of 4000 l. Marriage and Jointure: And 'tis a hard ſtrain to tranſlate a Truſt charged particularly on an Eſtate of ninety nine years, which is a void Eſtate beyond the words expreſs to another Eſtate; for though in truth Nicholas might have charged the firſt ninety nine years after the firſt 6000 l. charged thereon, yet he did not do it: And the mention that the Deeds 1651 and 1653. were for a Portion of Mony paid, that is untrue, for no more was paid than what was paid and ſatisfied by the former Settlement 1649.

The Lord Chancellor decreed the contrary, That the Truſt of the laſt 6000 l. ſhould be charged on the firſt ninety nine years. For Nicholas intended the raiſing thereof, and had power to charge the firſt ninety nine years therewith after the other 6000 l. raiſed, and regarded only the Parties intent to raiſe the Mony, though he pitched not on proper means.

But

But it was objected, that the Plaintiffs Title being voluntary, and the Defendants for valuable Considerations, the Plaintiffs Title prima facie is fraudulent against a Purchaser.

The Chancellor said, A voluntary Conveyance may be good and not fraudulent, and that from the Circumstances of persons of Honour who are Trustées, and concluded it not fraudulent.

And though he was prest to direct a Tryal at Law on that Point, would not do it, for whether fraudulent or not, it is not proper for this Court.

The Defendant being a Purchaser had no Notice of the Trust on the last Lease or Estate for ninety nine years, and so not bound by it clearly, she nor her Friends having no actual notice: And the rather for that the Deed of 1651. was revoaked, and so is recited to be. And there is indeed mention that an Estate was to be created to Russel, Rich and Lake, and their Heirs, but no mention that there was any new Estate for ninety nine years to be made to them, nor of the Trust to raise the 6000 l. herein mentioned.

But my Lord Chancellor declared, that there was sufficient notice in Law, or an implyed notice; for the Mortgage to Hewet was excepted in the Defendants Conveyance, and therefore they could not be ignorant of the Mortgage, and ought to have seen that, and that would have led them to the other Deeds, in which, pursued from one to another, the whole Cale must have been discovered to them.

A Recital of the Deed which does refer to the Incumbrance, is notice against a Purchaser.

But against this it was objected, that the Defendant could not inforce the Mortgagée to shew his assurances, nor would any Mortgagée so do; and when there was only 2000 l. due, thereon, which the Joyntresses Friends were content to be charged with, there was no reason to enquire further, especially into things collateral to the Mortgagées Estate. Besides, notice to charge a Purchaser ought to be perfect and compleat, and there was no means for such notice; for two things were to be notified, (viz) a Power to charge the 6000 l. and Execution of that Power, of which there was no colour, nor no means to be informed. For Isabels power was general to limit the 6000 l. to any person or persons at any time by Deed or Will; so the Enquiry was uncertain and almost impossible to find out.

Mr. Keck preſt it much, that it was without Preſident, that a voluntary Conveyance ſhould be decreed againſt a Purchaſer for valuable conſideration. Purchaſers were ever favoured by the Court.

My Lord Chancellor was not moved with this Objection.

Philips *againſt* Philips.

A Debtor Executor to the Teſtator, decreed to pay to the Deviſee of the Reſidue, *&c.*

NIcholas Philips the Teſtator made his Will, and made the Defendant Executor, and deviſed divers Legacies, and the reſidue of all his perſonal Eſtate to the Plaintiff. The Executor was Debtor to the Teſtator in 400 l. he left ſufficient perſonal Eſtate to pay all his particular Legacies.

The Queſtion was, Whether the 400 l. being diſcharged in Law to the Executor, ſhould be accounted as part of the Reſidue, there being no need of it to pay Debts or Legacies particularly given; for the Teſtator muſt not be ſuppoſed ignorant, but knowing of the Law, that by making his Debtor Executor he thereby diſcharged the Debt, and ſo the 400 l. became no part of the perſonal Eſtate, and ſo no Reſidue thereof. And difference was preſſed betwéen Legatées and Debtor, in which the Debt though diſcharged ſhould be Aſſets, and where it was betwéen the Executor, who is in this Caſe in effect a Deviſée of the Debt.

But the Lord Chancellor diſallowed the difference, and decréed for the Plaintiff the Reſidue, &c. againſt the Executor. Though it was objected that this Caſe was different from former Preſidents.

Gartſide *and* Elizabeth *his Wife, and* Ann Ratcliff, *an Infant, Plaintiffs, againſt* Peter Ratcliff *and others.* November 6.

Deeds ſuppreſſed and the Lands decreed without Tryal.

THE Caſe was, Ann the Mother of Elizabeth and Peter Ratcliff the Defendant, agreed that a Marriage ſhould be betwéen the Plaintiff Elizabeth and Peter, Son of the Defendant Peter Ratcliff. The Portion 500 l. And Lands

Lands of Peter and the Defendant were to be ſetled, part on Peter the Father for life, Remainder to Margaret his Wife, the Remainder of theſe Lands, and all other his Lands in poſſeſſion to Peter the younger, and his Heirs, frée from his Incumbrances. The Marriage was had and the Portion paid, and a Déed executed by Peter, purporting a Feoffment to the ſaid Uſes. But Peter the Father by a Will and Trick ſet forth in the Bill and proved, got the ſame again into his hands, and burnt or cancelled it.

The Bill is for Relief that the Plaintiff Elizabeth, the Wife of Peter the younger, may be relieved; for the Profits of one third of the Lands ſetled in poſſeſſion in Fæ to her Husband, and the Infant to have the other two Parts of the Inheritance of all according to the Marriage Agreément and Deed in purſuance thereof. Peter by Anſwer denyed the Settlement, and Henry the Son did ſo alſo, and that he had no notice of the Agréement, and made Title to the Lands by a former Marriage Settlement on the Marriage of Peter the Father, to the Father of Peter for life, Remainder to the firſt, ſecond, &c. Sons of Peter, in Tail, to the Heirs Males, &c. ſo as Peter, who made the Settlement by which the Plaintiffs claim, was but Tenant for life, Remainder to Peter the Son in Tail, Remainder to Henry the Defendant, ſecond Son of that Marriage, and to Peter the firſt. And ſo Peter the firſt Son being dead without Iſſue Male, the Land remained to him. But a Recovery was produced by the Plaintiff, ſuffered by Peter the younger, that he objected againſt the Recovery, becauſe the Father was Tenant for life, and ſurvived not.

The Plaintiff had a Decræ according to the Bill, and confirmed on Re-hearing of the Cauſe in Hill. 28 Car. 2. by the Lord Chancellor, becauſe the Father ſuppreſt and got into his hands the Writing, which was done for his advantage, for he needed not have ſo done for Henry's advantage; and where Deeds are ſuppreſt omnia præſumentur.

And the Chancellor would not allow a Tryal at Law whether the Father ſurvived to enable the Recovery or not.

Sir

Sir Francis Hill *againſt Sir* Robert Carr. November 6.

SIR Robert Carr covenanted with Sir Francis to ſecure 6000 l. to Sir Francis in conſideration of marrying his Siſter. Much Debate was formerly whether it was a Covenant, and ſo obliging to Sir Robert, or no; and Judges aſſiſting, there was a difference in Opinion in the Point, that it was a Covenant; for whereever the intent of the Parties could be collected out of a Deed for the not doing or doing a thing, a Covenant will lie: And the Chancellor declared his Opinion to be ſo. And a Covenant will lie on a Bond, for it proves an Agreement. And for further Security a Fine of certain Manors to be levyed by Sir Robert, and a Decree was pronounced accordingly. But on Re-hearing it was queſtioned whether the Decree ſhould be for the Fine to be levyed preſently, or till the Account betwen Sir Robert and the Plaintiff ſetled; for Sir Francis had received ſome Mony. And it was preſt by the Defendants Counſel, that till the Account paſt, the Duty was uncertain.

In what Caſes Action of Covenant will lie.

Decree for Security of the Mony which depended on Account, whether the Security ſhall be given before the Account ſtated.

2dly. That Sir Robert by levying a Fine Tenant in Tail ſhould ſubject his Eſtate to other Judgments and Statutes. It was anſwered, Security ought to precēd Payment; and if he were ſubject to other Statutes they were his own Debts; And his Act ought not to prejudice Sir Francis, who was intitled to have a Fine by Sir Robert his own Covenant, and there was no reaſon the Court ſhould hazard the Plaintiffs Debt, leſt Sir Robert ſhould be made ſubject to other Debts.

But the Lord Chancellor declared, as he after decreed for the Reaſons, ut ſupra, that the Fine ſhould be reſpited till the Account ſetled.

It was objected, that Sir Robert being Tenant in Tayl, if he ſhould dye before the Account ſetled, the Iſſue in Tayl will not be bound by the Decree.

Covenant to levy a Fine, and a Decree that he ſhall ſo do, binds the Iſſue in Tail.

But the Lord Chancellor anſwered, that the Covenant being to levy a Fine upon valuable conſideration, and a Decree in purſuance thereof, the Decree will bind the Iſſue, ſeeing the Father of Sir Robert had power by Fine to bar the Iſſue.

And

And another Matter was, the Defendant was left to his Remedy at Law on the Land by way of Covenant, to recover such Damages only as he had sustained by not setling the Joynture on his Wife, though she was now dead.

And we objected, that this Bond was for the Wifes advantage in Trust for her.

The Lord Kennoule *against the Earl of* Bedford, *and others, Trustees of* James *Earl of* Carlisle, *whose Heir at Law the Plaintiff was.* December 19.

THE Case was, The Earl by his last Will devised his Debts to be paid by his Lands in D. and if those sufficed not, by Sale of his Lands in S. and if those sufficed not, by Sale of his Park; and if that sufficed not, by sale of his Lands in Waltham, and devised that the Plaintiff should have 600 l. per annum, during his life out of his Lands in Waltham. The Trustees sold D. and S. and a great part of his Lands in Waltham, and paid the Debts; but the Park was not sold; but the Lands in Waltham not sold are not sufficient to answer the Annuity which was 4000 l. Arrear. It was prayed that since Waltham Lands were sold instead of his Park, that the Park might be sold to satisfie the Arrears, which was ordered accordingly, and the Mony to be so applyed. But there arose some Impediment in the sale by reason of some Title pretended to the Park by some who were no Parties to the Bill; and thereupon however the Possession of the Park was decreed to the Plaintiff against the Trustees, and all the Profits of Waltham Lands unsold.

Lands out of which an Annuity is issuing sold for payment of Debts, it was decreed to be paid out of other Lands unsold.

Freeman *against* Goodham. December 19.

THE Wife when sole, bought Goods for Mony, and after married, and dyed. The Goods came to the Husbands hands after her death, but the Debt remained unpaid.

The Husband charged with Debts of the Wife for Goods of the Wife.

The Bill by the Plaintiff, the Creditor, was to discover the Goods, and a Demurrer thereto, which was over-ruled by the Lord Chancellor, who with some earnestnes said he would change the Law in that Point.

D E

DE
Term. Sanct. Hill.
Anno Regis 28 & 29 Car. II.
IN
CANCELLARIA.

Pain *againſt* ..... January 18.

The Husband pleads: His Wife will not ſwear to it.

A Bill by the Plaintiff againſt the Husband and Wife, Daughter of the Plaintiff. The Husband put in a Plea in the name of him and his Wife, and ſwears to the Plea; but the Wife would not be ſworn. The Husband moved that the Plea might be accepted, ſuggeſting that the Wife did it by Combination with her Mother.

Ordered that the Plea ſtand as for the Husband, and the Plaintiff to proceed againſt the Wife.

Ford *Lord* Grey *againſt the Lady* Grey *and others.*
Et e contra.

The Father purchaſeth in the Name of a Son unadvanced, it is an Advancement, not a Truſt.

William Lord Grey had Iſſue Thomas his eldeſt Son, and Ralph his ſecond Son: William the Father for 13000 l. purchaſed the Manor of Goſfield in the Name of Thomas and his Heirs, and he enjoyed it, and took the Rents and bought other Lands adjoyning in his own name, and added them to the Park, and incloſed them therewith, and owned all as his own ſometimes; and Thomas declared ſeveral times, that the Manor was his Fathers, not his, or to that effect. But on the other ſide divers Speeches of his Fathers were proved, that it was his Sons, and the Son by his Will gave the Manor to his Father for Life; and divers Speeches alſo by the Son and Father that the Manor was Thomas his Manor, and the Father proved the ſaid Will, being Executor. The

The Question was, Whether the Purchase was a Trust in Thomas for the Father, or an Advancement by the Father to the Son. And decreed an Advancement, not a Trust. And whereas the Father did after the death of Tho. convey Gosfield and three other Manors in Trust to raise 2000 l. for two other of his Grandchildren, Ralph and Charles, Gosfield was not liable thereto.

Another Question was: Ralph Father of Ralph and Charles, and of Ford, did make a Conveyance of Gosfield to Trustees and their Heirs, to pay his Debts and Legacies; and after for performance of his Will, and at the same time made his Will, and thereby did devise the Trustees to pay 2000 l. apiece to Ralph and Charles, and also 6000 l. to Katharine his Daughter, the Surplus after to his Heir Ford, and made his Wife one of the Defendants Executrix, but gave her not thereby in Terms the personal Estate, but only made her Executrix; and devised that his said three Children should release to his Executrix all such Actions and Demands of his personal Estate to his Executrix. Now the Question was, whether the Executrix should be lyable to the Legacies of the Children in aid of the Heir, who had the Surplus of Gosfield that was to be sold?

Personal Estate in aid of the Heirs.

As to the Creditors it was agreed, she must be liable; but as to the Childrens Legacies there ought to be no aid for the Heir; for when the Legatees were by the Will to release all demands out of, or to the personal Estate, they could make no demand out of it, which shews his intent, that therefore as to the Interest and Legacies the personal Estate was to be discharged, and the Executrix to enjoy the Estate free against them, and therefore the Heir not to charge the Executrix as for those Legacies of which he discharged his Executrix, especially having otherwise provided for their satisfaction. And the Surplus to the Heir is expresly after Debts and Lagacies paid; therefore not before.

Lands devised for payment of Debts and Legacies, the personal Estate shall be first applyed.

Against which it was said, that regularly the personal Estate must aid the Heir, and an implyed intent must not without clear Expression alter the equitable general Law.

And there were other Reasons for the Release to be given (viz.) The Estate was in the Province of York, lyable to the Children for Portions.

The Lord Chancellor decreed the personal Estate to be accounted for in aid of the Heir in order to aid him for what he should be charged withal, not only as to the Creditors, but as to the Legacies charged on Gosfield (viz.) the 6000 l. to the younger Children.

DE
Term. Sanct. Trin.
Anno Regis 29 Car. II.
IN
CANCELLARIA.

Boynton *againſt Sir* Robert Sprignal. July 3.

A Term conveyed on Truſt to be void on purchaſing and ſettling on Sir Sprignal for life, and after to his Wife for life, with Remainder over of an indefeazible Title, and not Tithes, &c. and this Truſt was declared by Deed indented. After the Husband accepts of Lands in Buddington, part of the Lands of the Lord Craven, and deſires the ſame in lieu and ſatisfaction of what was to be done.

The Lord Craven on Reſtauration of the King enters.

The Lord Chancellor decrees the Truſtees to ſurrender the Leaſe to the Purchaſer of the Lands which were alienedby Sir Robert Sprignal.

Note. A Truſt by Deed interpreted to be ſatisfied by the Lands of a bad Title, tho the Deed of Truſt be of an indefeazible Title, on proof of Diſcourſe, and mention that the meaning was to ſettle Delinquents Lands; and the Feme Covert bound by Agreement of the Husband.

Needler *againſt* Deeble. July 12.

A Mortgagee ſued the Mortgagor to pay, or be foreclosed of Redemption. An Account was directed and ſetled before a Maſter; and now a ſubſequent Mortgagee, whoſe Mortgage was made before the former Bill was exhibited, ſued the firſt Mortgagee and Mortgagor to have a new Account, ſuppoſing the former Account to be falſe, and made by conſent and fraud; but did not inſiſt on any particulars, as in ſuch caſe he ought.

The Mortgagee bound by the Account between the firſt Mortgagee and Mortgagor.

The Lord Chancellor declared that the Account ſhould bind the ſecond Mortgagee without farther Examination, if the Fraud and Colluſion were anſwered; for the firſt Mortgagee did all he could, and is not bound to ſeek after the ſecond Mortgagee; for then it ſhould be in the power of the Mortgagor to make the Aſſurance uncertain and endleſs to the Mortgagee. It ſhall ſuffice to deny the Fraud and Colluſion.

No ravelling into an Account ſtated, but by charging of particulars.

DE
Term. Sanct. Mich.
Anno Regis 29 Car. II.
IN
CANCELLARIA.

Ayloff *againſt* Fanſhaw. October 15.

Mony brought into Court imbezelled.

THE Remembrancer of the Exchequer takes Mony brought into his Office by Order of Court, and ſpends it, and dieth; the ſucceeding Officer fearing to be charged with the Mony (viz. that his Office would be ſequeſtred (viz.) till the Mony made good by the Profits thereof) ſues the Party who ought to pay the Debt (viz.) the Defendant Fanſhaw, who was bound with the Lord Fanſhaw to the Lady Kent, upon account of which Debt the Mony was brought into Court, and which Defendant was Executrix, &c. to the Party, the late Remembrancer, who mil-employed the Mony. And a Demurrer to this Bill was diſallowed, and the Plaintiff might proceed in Chancery.

Barns *againſt* Canning *and* Piggot.

A Bill was exhibited to redeem a Mortgage againſt Canning. Pendente lite Canning conveyeth his Lands in queſtion to Piggot, for Mony. The Cauſe being brought to hearing, and a Decree for Canning, and enrolled; Canning being to borrow Mony of Barns, gave him a Conveyance of Lands, and aſſigned the benefit of that Decree, which were both (viz.) the Conveyance of the Lands and the Aſſignment of the Decree defeazanced for pay-

for payment of the Mony borrowed by Canning of Barns. Barns parted with the Mony, till that as well the Assignment of the Decree as the Assignment of the Lands were made, the Lands without the benefit of the Decree being not of value sufficient for the Security. Barns offered in Court to resign to Piggot and Canning both Land and Decree on payment of Debt and Damage, and insisted that Piggot coming in pendente lite could not in Cannings Name nor his own, sue a Bill of Review. Barns Suit was to set aside a Release of the Decree which Canning had made for no consideration.

The Chancellor disliked the purchasing of Decrees, and said he was mad that would do it: Yet if the Plaintiff had it, he would not avoid it, but made the question to be, Whether that the Assignment of a Decree was not a Collateral and Supplementary Security, and not an Original Security, and so took it to be, and dismist the Plaintiff.

He is mad that will purchase Decrees.

Assignment of a Decree a collateral supplementary Security.

Sir Robert Austins Case, who purchased and paid the same day that the Bill was exhibited by Culpeper, yet lost his Purchase, having no notice of his Suit.

Pit *against* Pidgeon. November 26.

Et è contra.

A. Deviseth that 300 l. be paid to his Child which he shall have at the time of his death; and if he have none, then to his Sister. Afterwards three Children are born to him; then by a Codicil he deviseth 200 l. to each of these Children to be paid at their respective Ages of twenty one years.

Devise of 300 l. to the Child he shall have at his death.

After he has three Children.

Then makes a Codicil, and gives each 200 l. a-piece.

The Lord Chancellor decreed, tho the 300 l. be devised to the Child, &c. and now there be three the Devise is not void for uncertainty, but all three Children share in it, and that the Devise of 200 l. being without words signifying the same to be of their Portions, nor any thing one way or another to revoke or affirm the former Gift of 300 l. it shall be taken by way of accumulation, and the Children shall have both Legacies.

Legacy and Accumulation.

Butcher

Butcher *againſt* Hinton *and* Short. December 5.

Short was not brought to Hearing.

THE Caſe. Butcher and Short Partners in Trade were indebted to Hinton a Banker, in a Bond of 12000 l. for payment of 6000 l. in October 1675. That Mony being due, Hinton in December 1675. was called upon by his Creditors importunately for great Sums of Mony. He requires Butcher and Short to pay him; whereupon they and Hinton agreé, that for 2000 l. they will become joyntly bound for ſo much to Hintons Creditors, and for 4000 l. reſidue each to be ſeverally bound to Hintons Creditors (viz.) each for 2000 l. and not joyntly; and Hinton gave a Receipt for 6000 l. under Hand and Seal to them, and agreed to deliver up the Bond of 12000 l. And being asked for it, excuſed the preſent delivery of it, becauſe of the preſent hurry of buſineſs, but would do it. The Bonds to the Creditors were accordingly entred into. The Agreement prout proved by three Witneſſes. The Bill was to have up the Bond of 12000 l. for Hinton in favour to Short endeavoured to charge Butcher.

Hinton in his Anſwer confeſt the Agreement, but that it was qualified, and part of the Agreement was, that Hinton ſhould be counter-ſecured by their Bonds againſt the Creditors to whom he was bound, and that he was dampnified for want of ſuch Counter-ſecurity; for that he had been ſued and forced to pay the Creditors 3000 l. and produced the Bonds whereon he paid the Mony cancelled; but he had no Witneſs that proved expreſly that part of the Agreement touching Counter-ſecurity, but proved four Bonds of Counterſecurity ſealed, &c. and left with the Scrivener, but not to be delivered till Matters agreed by Hinton and Butcher.

The Lord Chancellor. Take it for granted, that what Butcher did he agreed to do; or elſe he would not have done it.

A voluntary Agreement not obliging in Equity unleſs all be performed.

The Counſel for the Defendant inſiſted, that the Agreement being voluntary, unleſs all that ſhould have been performed were performed, the Defendant ſhould not be bound thereby in Equity, and his good Security taken from him.

Churchil. The Plaintiff fails in not paying nor giving Counterſecurity.

E contra.

E contra, It was said, that the Agreement was to give Bond, not to pay the Mony; for the Bond once given binds to payment, and the failer of Short to give Security may not prejudice Butcher, who did: And the Caution to the Scrivener must be intended of the relate to, not the delivering up the 12000 l. Bond; for no Reason to countersecure and become doubly bound for the same Debt, but ought first to be discharged of the old Bond and Debt.

The Lord Chancellor. This Debate assures me that Short has failed, or else the Contention is vain; and the Agreement not being fully performed, I cannot take away Hintons legal Security and pay him with Parchment; and Hinton had little avail by the Agreement, being bound in the new Bond.

Vanacres *Case*. December 20.

A Was indebted to B. Vanacre in 7000 l. and to C. and others in 300 l. and became Bankrupt. B. sued at Law, and had Judgment, and by Fieri fac. 23000 l. by Goods, but knew nothing of the Bankrupcy. C. sued out a Commission of Bankrupcy, and had those Goods that were taken in Execution assigned, and for some of them brings an Action of Trover against B. and hath Judgment and Execution for 50 l. or thereabouts. B. dyeth, and the Assignée of the Commissioners brought an Action of Trover against the Executor for the rest of the Goods, and recovers 500 l. and hath it, and then brought a Bill in Chancery for the rest of the Goods against the Executor, as in Case of an Executor, who commits a Devastavit, and dyeth, his Executor shall be charged here, tho he cannot be charged at Common Law.

On the first Hearing an Order was drawn up, that the Petitioner and other Creditors should come to an Account and proportionably have satisfaction out of the Estate not recovered. Whereupon the Case came now to be reheard and so ordered.

Creditors to come to an Account, and to have proportionable satisfaction out of the Estate not recovered.

The Lord Chancellor. The Order is not well grounded. This is not like the Case of a Devastavit, wherein in time the Common Law will be altered. I should not in this Case have decreed the Executors to account, but grounded my self on a Consent, and that was, that the whole Debts and whole Estate be on all hands accounted for, comprehending the Mony recovered, and proportionably divided.

Then Costs was prayed to be, for that the Executors should pay Contribution Mony; but decreed otherwise.

Note,

Note, The Executor in Case of a Devastavit is in nature of a Trustee of an Estate. The Testator here is a Purchaser, to which the Executor is no way lyable.

Willoughby *against* Perne. December 21.

THE Bill was to be relieved against a Statute of 26 Eliz. 94 years old, by the Heir, against a Lease of 60 years made by the Ancestor, for A. in Trust for 40 l. a year, to a Wife for a Joynture, the Heir claiming by another Statute eigne to the Lease in Trust, so as the Lease could not hurt him.

The Wife to protect her self against the Statute pendente lite, after the Bill exhibited, procured an Assignment of the first Statute, and set it forth by Answer. Against which, Proof was made by the Plaintiff, that the Defendant, (viz.) the present Husband, who married her when a Widow, had after the Bill forged and falsified the Church Book, whereby it would appear that the Statute was not acknowledged by the Befail, as the Defendant pretended, and who after the Statute purchased the Land, but by the Befail of the same Name. And that William the Befail was an Infant, (viz.) of sixteen years, and so it was to be presumed, that after so long time, that his Father, and not he was Cognizor, and then the Land not being ever in the Befail, his Statute could never affect the Land; and the Equity of the Plaintiff was on the Antiquity of the Statute, because of the falsity of the Defendant.

Antiquity of a Statute answered by being proved and Interest paid

The Plaintiffs Evidence of his defence at Law is suppressed, and the Defendant having sworn in his Answer he knew not of the Statute of 26 Eliz. till such time, that was also proved false. The Defendant proved the Lease and Joynture and Payment of Interest till 1644. and then Agreement to forbear Extent till 1658. and then a Minority.

The Lord Chancellor. This Statute being proved, and Interest paid, the Antiquity is answered, and a Man shall not be arraigned out of his Estate; and it is not material what was given or paid; for if he paid nothing the Heir shall not profit himself by it. But a Proposal being made by the Defendant, time was given to the Plaintiff to accept it, or be dismist.

DE

DE
Term. Sanct. Hill.

Anno Regis 29 & 30 Car. II.
IN
CANCELLARIA.

Stock *againſt* Denew.

THE Defendant libelled in the Admiralty Court of Dover againſt the Ship called the, &c. and ſuggeſted himſelf Owner, and that the Ship was unlawfully taken from him at Sea; and the Ship coming into Dover Road and arreſted, one Parlivan came & pro intereſſe ſuo pleaded to the Proceſs of the Admiralty; That during the War between England and Holland, a Dutchman (naming him) by virtue of a Commiſſion from the States, took the Ship and ſold it to him, and thereupon the Plaintiffs Stock and his Surety did give a Bond to pay the Condemnation Mony. On final Judgment of that Court the Ship was there appraiſed, and Sentence for the Plaintiff, becauſe the Defendant failed in proof; and the Defendant appealed to the Duke of York (Chief Admiral of Dover) and a Commiſſion by the Duke to hear and ſentence, &c. and therein the Appellant proved the Commiſſion to the Dutchman and Captain, and had Sentence for her. But the Bond being put in ſuit at the Common Law, the Defendant pleaded the Sentence in the Appeal. But the queſtion there was, Whether the Appeal was well brought, becauſe it was not ſufficiently ſet forth that the Duke had Jurisdiction of the Judges in Camera Scaccarii

(for there it was depending by Writ of Error) directed search to be made for Presidents of Appeal to the Duke as Admiral, but none could be found. The Defendant exhibited his Bill in Chancery, and finds there no relief, for he desired there to examine his Witnesses, and to have a Commission for that end. But in regard the Appeal was not brought in time, prevailed not.

No Appeal from the Court of *Dover* to the High Admiral.

The Plaintiff petitioned the King on the whole matter, and prayed a Commission of Review of the Dover Sentence; and the Dutch Agent or Ambassador interposed therein; and it being Business of State, and relating to Articles made on the Peace, An Order was made by the King and Council, that the Parties should go to Trial, and the property be insisted on (viz.) in effect, whether the Ship was lawful Prize or no, in an Action of Trover. Stock thereupon moved in Chancery to stay Proceedings on the Judgment at Law till the Trial, which was granted, it being a matter of State, and of which the King and Council had taken notice. But Stock desired the Depositions of Witnesses taken in Chancery and Dover Court, and that the Commission from the Duke might be used at the Trial. By Order of Chancery those of Dover and in Chancery were yielded to; but opposition was made to the Depositions by the Dover Commission, because they were coram non Judice.

The Lord Chancellor denied the use of them for that reason. But the Plaintiff shall not therefore lose his Cause, if he can yet make proof, tho he mistook his way; and the Case concerns matter of State, and therefore he shall have a Commission to prove his Cause if he can. But the Plaintiff shall bring the Money into Court.

Condition of a Bond to pay the final Condemnation of the Court of *Dover* how relieved.

Note, It is admitted at Law and in Chancery, That tho the Condition of the Bond was to pay the final Condemnation of the Court of Dover, yet if the Appeal had been right, and the Sentence at Dover repealed, the Plaintiff should be eased of the Bond. The Injunction was continued till the Trial.]

DE

DE
Termino Paſchæ
Anno Regis 30 Car. II.
IN
CANCELLARIA.

Anonymus. April 18.

A Commiſſion of Bankrupcy was taken out againſt Thomas Forth the 17th of Nov. 1676. but proſecuted only by Mrs. Ruſhworth; the other Creditors conſenting that Execution of the Commiſſion be forborn a month, but Ruſhworth did not conſent nor knew thereof, but herſelf proſecuted, and ſhe ſued Mead, who had poſſeſt the Eſtate by Aſſignment of the Bankrupt. And it was inſiſted at the Trial, that Forth, who was the Bankrupt, was not ſo; and after ſhe had a Verdict, and the four months were out; three weeks after ſhe petitions to be admitted into the diſtribution, and now would contribute to the Charges, the ſuſpenſion of executing the Commiſſion having been ſo ordered by the Chancellor; and now directed to be admitted into Contribution by my Lord Chancellor.

The Lady Turner *againſt* Bromfield.

THE Plaintiff being to marry Aſton, it was agreed between Sir William Aſton and Mr. Ewer the Plaintiffs Father, that 2000 l. Portion ſhall be paid, and 300 l. per annum ſettled for the Ladies Jointure. And the Lands in queſtion, in order thereunto were leaſed to Stephen Ewer and Nicholas Ewer, for 99 years if the Plaintiff lived ſo long, and Stephen and Nicholas redemiſed the Lands to

Whether a truſt of a Term for the Wife be diſpoſable by the Husband.

Aſton for a leſſer Term, rendring 300 l. Rent per annum. The Portion was paid on the Marriage, and the Inheritance ſetled on the Husband; the Husband died, the Plaintiff married Sir Edward Turner, and he for valuable conſideration ſold all his Eſtate at Law and Equity which he had in his own or his Wifes Right, and thoſe under whom the Defendants claim, and made a Jointure of other Lands of 200 l. to the Plaintiff, who exhibited her Bill for the 300 l. per annum, and ſhe is Executrix to Nicholas Ewer ſurviving Truſtee. The queſtion was, Whether the ſale by Sir Edward Turner, her ſecond Husband, ſhould bar having the Jointure, for there was no Agreement for that to bar her firſt.

But it was inſiſted on, That tho the firſt Husband might not alien, the ſecond might; for it was no more than if a Wife were Ceſtui que truſt of a Term, the Husband might ſell, which was ſaid, he might, for tho a thing in Action was not vendible at Common Law, yet is every day otherwiſe in Equity.

The Husband cannot ſell the Wifes Jointure by a former Husband.

The Lord Chancellor agreed, If a Husband make a Leaſe for years in Truſt for the Wife voluntary, and he ſells, this may bind the Wife, becauſe of the Fraud. But where a Truſt is created for a Wife, as here in this Caſe bona fide, the Husband can in no wiſe bind the Wife, unleſs where ſhe is examined, as in a Fine, or in this Court; elſe no Man ſhall be able to provide for Wife or Children. And he had no regard of notice, or not, to the Purchaſer, tho in the Cauſe, nor to the ſecond Jointure. And decreed for the Plaintiff; and a former Preſident in Point was ſhewn.

Becauſe then there ſhould be a perpetuity of a Term; and tho there be difference in words when Lands of Freehold are deviſed to one for life, the Remainder afterwards to his Heirs immediately, and when a Term is ſo deviſed, the difference is in words; and new Eſtates, Jointures and Settlements are of long Terms: And a ſimilitude is between them, &c.

DE
Term. Sanct. Hill.
Anno Regis 30 & 31 Car. II.
IN
CANCELLARIA.

Civil *againſt* Rich. January 24 & 25.

THE Queſtion was on a Will, whereby after other Bequeſts this Clauſe was added, (viz.) *Item*, All the reſt of my Lands, Goods and perſonal Eſtate I give to *A. B.* on Truſt, to give my Children and Grandchildren according to their Demerits. The Teſtator dyed: The Deviſee, who was Heir and Executor, gives the Land to one omitting the reſt. And the Queſtion was, If that was a diſpoſition according to the Truſt, and was much argued.

All the reſt of my Eſtate I give to *A. B.* to give to my Children and Grandchildren according to their Demerits.

The Lord Chancellor. I take it for a Rule, that whereſoever there is a demand in Law or Equity, there muſt be a certainty of the thing demanded to be adjudged or decreed; here it is left both for the time when the Demand ſhall be made and to the Sum or proportion of the Lands, and here is by that means an uncertainty of the Parties to whom he may afterwards have more or leſs Grandchildren. I ſit not here to make the Wills of Men, nor to interpret them farther than the Wills go; and therefore as to the Settlement of the Lands on one and not on all I cannot alter; It is clear the Children are not to come in by the Will immediately, but by the Act of the Deviſee; and he is to give or diſtribute according to their Demerits; therefore he is Judge; and diſmiſt the Bill as to that.

Whereſoever there is a Demand there muſt be a certainty of the thing demanded.

He

Deviſes to his Wife to diſtribute among his Children during her Widowhood ſhe marries, and then diſtributes, not good.

He remembred ſeveral Caſes in this Court, (viz.) one adjudged by himſelf, where the Husband of a ſecond Wife having two Daughters by the firſt, deviſed his perſonal Eſtate to his Wife to be diſtributed among the Daughters during the Widowhood of his Wife, and dyed; ſhe married again, and afterwards gave the whole to one of them, in that Caſe the other was relieved, becauſe the power of diſtributing during her Widowhood did determine upon her ſecond Marriage, and a Truſt may be annexed to a Power or to an Eſtate with Power.

Deviſes to his Wife in hope ſhe will leave it to his Son, no Truſt.

He alſo remembred a Caſe betwæn ..... and ..... in the Lord Egertons time, where one poſſeſſed of Leaſes for years deviſed them to his Wife, and hoped ſhe would leave them his Son, and dyed. Her ſecond Husband granted the Leaſes away; the Son ſued to be relieved, but was diſmiſt; for it was no Truſt for the Son.

And in the principal Caſe, he ſaid, though they amounted not to give the Plaintiff the Lands, yet the words were not idle, but put a reſtraint on the Deviſée; for though he might give the Lands as he did, yet he could not give them in Poſſeſſion or Remainder to any Stranger, but only to the Family.

Whether the Eſtate which a Citizen hath as Executor to another, be lyable to the Cuſtom.

Then another Queſtion aroſe touching the Perſonal Eſtate, wherein the Point was, That a Citizen of London, being reſiduary Legatée, dying, whether this being but a Legacy, which till Election reſted prima facie in the Legatée, not as Legatée, but as Executor, (for he was Executor) and the firſt Teſtators Eſtate, which remains in the Executor as Executor, ſhall not be ſubject to the Cuſtom as the Executors own Eſtate.

The Lord Chancellor decréed the contrary, and ſaid, I will make Election for him.

Clark *againſt* Danvers. January 28.

SAmuel Wats Grandfather of the Plaintiff, took a Copyhold Eſtate in Reverſion for three Lives: And the Copy was to Elizabeth Mother of the Plaintiff, and to J.S. and Danvers ſucceſſively. Elizabeth was made the Purchaſer (viz.) Et Eliz. dat pro fine 4 l. By the Cuſtom of the Manor the firſt taker may bar the Remainder. Danvers the Defendant was Godſon to the ſaid Samuel, Elizabeth the firſt taker, and J. S. dyed. Danvers is admitted; the Copy-

Copyhold was decreed to the Plaintiff, Heir and Executor to Elizabeth; for my Lord Chancellor held, that though Samuel paid the Fine; yet when by his Consent Elizabeth was made Purchaser in the Copy, it shall be taken as all one as if she had paid it. And if so, it shall be intended that all the Estates in Remainder were in Trust for her, and she hath Power, as by the Custom, so by the Trust, as Cestuy que Trust to dispose of them.

Trust of a Freehold for Life decreed to the Heir.

Sir Francis Winnington objected, That however the Plaintiff was not intituled; for as Heir or Executor she cannot be intituled to the Trust of a Freehold for Life.

The Lord Chancellor. Who shall have it, &c.

Gold *against* Canham. January 28.

GOld, Lee and Canham were Partners in a Trade at Leghorn; upon Account they dissolve their Partnership, and Gold had his share satisfied him out of the Stock. Many years afterwards Gold had occasion to receive 500 Dollars at Leghorn, which was to be paid him for Merchandize by A. B. another Stranger, which no way related to the Partners Trade. The 500 Dollars were consigned by Bill drawn on Kirk by Canham payable to Gold, to be received for his use, and Gold received them. Canham sued at Law for the Dollars. Gold sues here to be relieved, and insists that he ought to detain the same, because when the Partnership was dissolved, Canham did covenant to save him harmless from all Losses and Damages due or which might be due, or brought on, or which might or should happen to him the said Gold in relation to his part; and that long after the dissolution of the Partnership he was sued by the Duke of Tuscany for Customs unpaid at Leghorn, for the Goods which belonged to the Joint Trade, which amounted to 60 l. and Costs, which he had paid, and therefore insisted to retain to pay himself out of the Dollars.

Reteiner of Mony in his Hands for satisfaction of a Contract to save harmless.

Mr. Attorny Jones. The Partnership was long surrendred (I think he said fourteen years) in all which time we have nothing to do with Gold, and the 500 Dollars is paid only to our use, and no relation to the Partnership. And the Covenant to save harmless is no Debt, but only rests in Damages. And to the Sentence in Law we are no Party, nor ever acquainted with it. And by what Evidence or

faint

faint defence made by Gold the Sentence was given, we know not. And it is more probable when Gold had his Mony in our Hands, he on design to pay himself out of our Mony in his Hands made faint or no defence. And its improbable that the Dukes Officers should be so long negligent of the Dues to the Duke, and the Plaintiff should have given notice to the Defendant.

The Lord Chancellor. Whether the Bill of Exchange was before or after the Sentence doth not appear.

Mr. Attorny objected. This is like a foreign Attachment to pay due on one Account, or occasion out of another, and the Mony is not due from Canham only, but also from Lee, till at last it was answered, that Canhams Covenant extends to all which Golds part suffered.

And decreed accordingly.

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